No. 15-5238

Title:	Lester Ray Nichols, Petitioner
	v.
	United States
Docketed:	July 16, 2015
Lower Ct:	United States Court of Appeals for the Tenth Circuit
Case Nos.:	(14-3041)
Decision Date:	December 30, 2014
Rehearing Denied:	April 15, 2015

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jul 14 2015	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due August 17, 2015)
Aug 12 2015	Order extending time to file response to petition to and including September 16, 2015.
Sep 16 2015	Brief of respondent United States in opposition filed.
Sep 25 2015	Reply of petitioner Lester Ray Nichols filed.
Oct 1 2015	DISTRIBUTED for Conference of October 16, 2015.
Oct 26 2015	DISTRIBUTED for Conference of October 30, 2015.
Nov 2 2015	DISTRIBUTED for Conference of November 6, 2015.
Nov 6 2015	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED limited to Question 1 presented by the petition.
Dec 15 2015	The time to file the joint appendix and petitioner's brief on the merits is extended to and including December 23, 2015.
Dec 15 2015	The time to file respondent's brief on the merits is extended to and including January 26, 2016.
Dec 23 2015	SET FOR ARGUMENT ON Tuesday, March 1, 2016
Dec 23 2015	Joint appendix filed. (Statement of costs filed)
Dec 23 2015	Brief of petitioner Lester Ray Nichols filed.
Jan 4 2016	Record requested from the U.S.C.A. 10th Circuit.
Jan 7 2016	Record received from the U.S.C.A. 10th Circuit is electronic and located on PACER with the exception of 1 envelope.
Jan 15 2016	CIRCULATED.
Jan 26 2016	Brief of respondent United States filed. (Distributed)
Feb 10 2016	Supplemental brief of respondent United States filed. (Distributed)
Feb 19 2016	Reply of petitioner Lester Ray Nichols filed. (Distributed)
Mar 1 2016	Argued. For petitioner: Daniel T. Hansmeier, Kansas City, Kan. For respondent: Curtis E. Gannon, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Apr 4 2016	Judgment REVERSED. Alito, J., delivered the opinion for a unanimous Court.

May 6 2016 JUDGMENT ISSUED

RECORD
AND
BRIEFS

No. 15-5238

IN THE
SUPREME COURT OF THE UNITED STATES

LESTER RAY NICHOLS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Supreme Court, U.S.
FILED
JUL 14 2015
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ORIG

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Now comes the Petitioner, Lester Ray Nichols, by his undersigned federal public defender, and pursuant to 18 U.S.C. § 3006A and Rule 39.1 of this Court, respectfully requests leave to proceed in forma pauperis before this Court, and to file the attached Petition For Writ Of Certiorari to the United States Court of Appeals for the Tenth Circuit without prepayment of filing fees and costs.

In support of this motion, Petitioner states that he is indigent, that he was found indigent by both the district court and the Tenth Circuit, and that he was represented by Assistant Federal Public Defender Timothy Henry, pursuant to 18 U.S.C. § 3006A, in the lower courts. Petitioner was sentenced to a term of imprisonment in the United States Bureau of Prisons. He is currently serving the term of supervised release also imposed in this case.

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Date: July 14, 2015

No. 15-5238

IN THE
SUPREME COURT OF THE UNITED STATES

LESTER RAY NICHOLS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Supreme Court, U.S.
FILED
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ORIGINAL

QUESTIONS PRESENTED

Two men lived on opposite sides of the Missouri River in the Kansas City Metropolitan area, one in Missouri within the Eighth Circuit, the other in Kansas within the Tenth Circuit. Both men were convicted of sex offenses before the enactment of the Sex Offender Registration and Notification Act ("SORNA"), but were required to register under SORNA. Both men traveled from their homes to the Kansas City International Airport, flew to the same foreign country to reside, and thereafter did not update their registrations in the jurisdictions they had left. On these facts, the Eighth Circuit ruled in *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013), that the failure to update a registration does not violate SORNA. The Tenth Circuit came to the opposite conclusion in Petitioner's case, on the basis of its earlier decision in *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011).

This case presents the following questions:

I. Whether 42 U.S.C. § 16913(a) requires a sex offender who resides in a foreign country to update his registration in the jurisdiction where he formerly resided, a question that divides the courts of appeals?

II. Whether 42 U.S.C. § 16913(d) is an unconstitutional delegation of legislative authority to the Executive Branch because it grants the Attorney General unguided discretion to determine who to prosecute for violations of SORNA, a question that caused disagreement within the Tenth Circuit below?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES CITED iv
- Cases iv
- Statutes v
- Other vi

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2
- A. Statutory Background 4
- B. Factual Background 7
- C. Proceedings in the District Court 8
- D. Proceedings in the Court of Appeals 9

REASONS FOR GRANTING THE WRIT 12

I. The Courts of Appeals are Split Over Whether SORNA Applies to Sex Offenders Who Move to Foreign Jurisdictions 12

A. There Is An Entrenched Conflict Within The Circuits On SORNA's Application To Offenders Who Move To Foreign Jurisdictions 12

B. Resolution Of This Question Is Critically Important To The Viability Of SORNAs Registration System 15

C. The Tenth Circuit Erred In Holding That Sex Offenders Who Move To Foreign Jurisdictions Must Update Registrations In Former Jurisdictions 18

1. By its plain terms, a sex offender need only register where he "resides," not where he "resided." 19

2. Other related provisions confirm that an offender must register, and update a registration, where he "resides," not where he "resided." 20

3. SORNA's purpose confirms that offenders who move to a foreign country need not register or update a registration. 23

4. If nothing else, the rule of lenity requires that this Court interpret SORNA in Mr. Nichols's favor. 24

D. This Case Is An Excellent Vehicle For Resolving The Circuit Split. 24

II. This Court Should Resolve Whether And Under What Standard Congress Can Constitutionally Delegate Its Legislative Authority To The Attorney General To Define The Scope Of A Criminal Law 25

A. This Court Should Resolve Whether Greater Specificity Is Required When Congress Delegates Its Legislative Authority To Define The Reach Of A Criminal Statute To Another Branch Of Government. 27

B. The Tenth Circuit Erred When It Held That Congress's Delegation To The Attorney General In § 16913(d) Is Constitutional. 30

C. This Case Is An Excellent Vehicle For Deciding This Exceptionally Important Question. 32

CONCLUSION 32

INDEX TO APPENDIX

Appendix A: Decision of the Tenth Circuit 1

Appendix B: District Court Order denying Motion to Dismiss 16

Appendix C: Decision of the Tenth Circuit Denying Rehearing En Banc 25

Appendix D: 42 U.S.C. § 16911 50

Appendix E: 42 U.S.C. § 16913 55

Appendix F: 28 C.F.R. § 72.3 57

TABLE OF AUTHORITIES CITED

PAGE

Cases

American Power & Light Co. v. SEC, 329 U.S. 90 (1946) 27

Carr v. United States, 560 U.S. 438 (2010) ..... passim

Dean v. United States, 556 U.S. 568 (2009) 19

DOT v. Ass'n of Am. Railroads, 135 S.Ct. 1225 (2015) 27

Ex Parte United States, 287 U S. 241 (1932) 26

Fahey v. Mallonee, 332 U.S. 245 (1947) 29

INS v. Chadha, 462 U.S. 919 (1983) 26

J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928) 27

Liparota v. United States, 471 U.S. 419 (1985) 24

Loving v. United States, 517 U.S. 748 (1996) 26

Mistretta v. United States, 488 U.S. 361 (1989) 26, 27, 28

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) 30

Reynolds v. United States, 132 S.Ct. 975 (2012) 9, 30, 31, 32

Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749 (5th Cir. 2001) 26

Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 30

Touby v. United States, 500 U.S. 160 (1991) 10, 28, 29

United States v. Cooper, 750 F.3d 263 (3d Cir.), *cert. denied*, 135 S.Ct. 209 (2014) ... 10

United States v. Evans, 333 U.S. 483 (1948) 26

United States v. George, 228 U.S. 14 (1913) 31

United States v. Goodwin, 717 F.3d 511 (7th Cir. 2013) 28

United States v. Hinckley, 550 F.3d 926 (10th Cir. 2008) 31

United States v. Lanier, 520 U.S. 259 (1997) 17

United States v. Lewis, 768 F.3d 1086 (10th Cir. 2014) 13

United States v. Lunsford, 725 F.3d 859 (8th Cir. 2013) ..... passim

United States v. Murphy, 664 F.3d 798 (10th Cir. 2011) ..... passim

Whitman v. United States, 135 S. Ct. 352 (2015) 24

Statutes

18 U.S.C. § 2250(a) ..... passim

18 U.S.C. § 2423 7

18 U.S.C. § 3231 1

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

42 U.S.C. § 16901 ..... passim

42 U.S.C. § 16911 2

42 U.S.C. § 16911(10) 6, 12, 19, 21

42 U.S.C. § 16911(13) 5, 19

42 U.S.C. § 16911(5) 5

42 U.S.C. § 16913 ..... 2, 3, 12

42 U.S.C. § 16913(a) ..... passim

42 U.S.C. § 16913(b)(1) 5

42 U.S.C. § 16913(b)(2) 5

42 U.S.C. § 16913(c) 5, 21, 22

42 U.S.C. § 16913(d) ..... passim

42 U.S.C. § 16914(a) 5

42 U.S.C. § 16928 ..... 2, 6, 22

Other Authorities

28 C.F.R. § 72.3 ..... 2, 7

Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, Tit. 1, 120 Stat. 587 (2006) 4

Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, 111 Stat. 2440 (1997) 5

Pam Lyncher Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, 110 Stat. 3093 (1996) 4

The National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30,210-01 (May 30, 2007) 7

The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030-01 (July 2, 2008) 3, 6, 7, 23

Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994) 4

PETITION FOR WRIT OF CERTIORARI

Petitioner Lester Ray Nichols respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The panel decision of the United States Court of Appeals for the Tenth Circuit is published at 775 F.3d 1225 (10th Cir. 2014), and is included as Appendix A. The decision denying rehearing en banc, including dissents from the denial, is published at 784 F.3d 666 (10th Cir. 2015), and is included as Appendix C. The unpublished order of the district court, denying Mr. Nichols's motion to dismiss the indictment, is included as Appendix B.

JURISDICTION

The United States District Court for the District of Kansas originally had jurisdiction pursuant to 18 U.S.C. § 3231, which provides exclusive jurisdiction for offenses against the United States. Mr. Nichols timely appealed his conviction to the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1291. The Tenth Circuit affirmed the conviction and, on April 15, 2015, denied Mr. Nichols's petition for rehearing en banc. Mr. Nichols seeks review in this Court of the Tenth Circuit's judgment and order. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 1, Clause 1 of the United States Constitution provides:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

18 U.S.C. § 2250(a) provides:

> (a) In general.—Whoever—
>
> (1) is required to register under the Sex Offender Registration and Notification Act;
>
> (2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
>
> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
>
> (3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;
>
> shall be fined under this title or imprisoned not more than 10 years, or both.

42 U.S.C. § 16911 (full text included as Appendix D)

42 U.S.C. § 16913 (full text included as Appendix E)

42 U.S.C. § 16928**Error! Bookmark not defined.** provides:

> The Attorney General, in consultation with the Secretary of State and the Secretary of Homeland Security, shall establish and maintain a system for informing the relevant jurisdictions about persons entering the United States who are required to register under this subchapter. The Secretary of State and the Secretary of Homeland Security shall provide such information and carry out such functions as the Attorney General may direct in the operation of the system.

28 C.F.R. § 72.3 (full text included as Appendix F)

STATEMENT OF THE CASE

Congress enacted the Sex Offender Registration and Notification Act ("SORNA") to bring uniformity to the varied state sex offender registries. At present, this goal of

uniformity is unfulfilled in light of differing interpretations of the term "resides" in 42 U.S.C. § 16913 by the Eighth and Tenth Circuits. In jurisdictions within the Eighth Circuit, offenders who move to foreign jurisdictions have no obligation to update their registrations in former jurisdictions. In jurisdictions within the Tenth Circuit, in contrast, offenders who move to foreign jurisdictions are expected to update their registrations in the jurisdiction in which they formerly resided. In jurisdictions other than the Eighth and Tenth Circuits, it is unclear whether offenders who move to foreign jurisdictions must register with the former jurisdiction. Simply put, confusion on this issue is widespread. The conflict is entrenched, and the issue is of exceptional importance to the viability of a uniform national sex offender registry.

Moreover, a fundamental constitutional issue lurks in this case. In 42 U.S.C. § 16913(d), Congress delegated to the Attorney General the authority to apply SORNA to offenders convicted before the enactment of SORNA (pre-Act offenders). Ultimately, the Attorney General issued a regulation specifying that SORNA applies to all pre-Act offenders. The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030-01, 38,063 (July 2, 2008). Because it is a crime for a sex offender to fail to register, *see* 18 U.S.C. § 2250(a), in light of the Attorney General's decision to apply SORNA retroactively, if a pre-Act offender fails to register or update his registration under SORNA, he has violated § 2250(a).

The constitutionality of this delegation is an issue of extreme importance. It is one thing for Congress to delegate regulatory functions to the Executive Branch. It is

quite another for Congress to delegate the reach of a criminal statute to the Executive Branch. After all, it is the Executive Branch that enforces a criminal statute. Delegating the decision on who to prosecute to the prosecuting authority obliterates the separation of powers inherent in our constitutional system.

A. Statutory Background

In 2006, Congress enacted the Adam Walsh Child Protection and Safety Act ("the Adam Walsh Act"), Pub. L. No. 109-248, Tit. 1, 120 Stat. 587 (2006), with the intent to establish a national registration system for sex offenders. 42 U.S.C. § 16901, *et seq.* SORNA, Congress's most recent Congressional effort to "set national standards for state sex-offender registration programs," comprises a significant portion of the Adam Walsh Act. *See* 42 U.S.C. §§ 16911 16929.

Before SORNA's enactment, federal law focused not on a national registration system, but on state sex offender registries. The original legislation, the Wetterling Crimes Against Children and Sexually Violent Offender Registration Act ("Wetterling Act"), Pub. L. No. 103-322, 108 Stat. 1796, 2038 (1994), required certain offenders to register their addresses with a designated state law-enforcement agency upon release from prison. *Id.* at 2038-2041. Two years later, after every state had created a registry, Congress amended the Wetterling Act to establish a comprehensive national sex offender registry at the FBI. Pam Lyncher Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, 110 Stat. 3093 (1996) (codified as amended at 42 U.S.C. § 14072). The following year, Congress again amended the Wetterling Act to require states to participate in the national registry

by providing information on sex offenders to the FBI. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2461-2467 (1997) (codified at 42 U.S.C. §§ 14071 14072).

Ultimately, believing that "the patchwork of standards that had resulted from piecemeal amendments [to the Wetterling Act] should be replaced with a comprehensive new set of standards," Congress passed SORNA. 120 Stat. 587-601 (codified at 18 U.S.C. § 2250 and 42 U.S.C. § 16901 *et seq.*). SORNA created a new, national sex offender registry, expanded the definition of "sex offense," 42 U.S.C. § 16911(5), and added to the information states must collect about offenders. 42 U.S.C. § 16914(a). Under SORNA, a sex offender must register either "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement" or "not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment." 42 U.S.C. § 16913(b)(1), (2). The offender must also update the registration "in person" "not later than 3 business days *after* each change of" name, residence, employer, or student status. 42 U.S.C. § 16913(c) (emphasis added).

The registration requirements provide that "[a] sex offender shall register, and keep the registration current, in each jurisdiction where the offender *resides*, where the offender *is* an employee, and where the offender *is* a student." 42 U.S.C. § 16913(a) (emphases added). "Resides" is defined as "the location of the individual's home or other place where the individual habitually *lives*." 42 U.S.C. § 16911(13) (emphasis

added). The National Guidelines for Sex Offender Registration and Notification ("National Guidelines") define "habitually lives" as a period of "30 days." 73 Fed. Reg. 38,030-01, 38,061. "Jurisdiction" is limited to federal lands (a state, the District of Columbia, etc.), and does not include foreign countries. 42 U.S.C. § 16911(10).

For sex offenders entering the United States from a foreign country, Congress ordered the Attorney General to "establish and maintain a system for informing the relevant jurisdictions about [such] persons." 42 U.S.C. § 16928. For sex offenders departing the United States to live in a foreign country, the National Guidelines recognize that the offender "may pass beyond the reach of U.S. jurisdictions and hence may not be subject to any enforceable registration requirement under U.S. law unless and until he or she returns to the United States." 73 Fed. Reg. 38,030-01, 38,066. Notably, no statute or regulation requires a sex offender to inform a relevant jurisdiction that he is leaving the United States.

Congress further made it a felony for any person who is required to register under SORNA, and who then travels in interstate or foreign commerce, to knowingly fail to register or update a registration. 18 U.S.C. § 2250(a). Violation of this provision is punishable by up to ten years' imprisonment. *Id.* Importantly, Congress granted the Attorney General "authority to specify the applicability of the [registration] requirements . . . to sex offenders convicted before the enactment of this chapter . . . ." 42 U.S.C. § 16913(d). Aside from the general statement of purpose found in the Adam Walsh Act, however, Congress provided no further guidance, substantive or otherwise, for how the Attorney General ought to exercise that authority. *Id.*

On February 28, 2007, the Attorney General promulgated an interim regulation under the authority granted him by § 16913(d), specifying that the requirements of SORNA applied to all pre-Act sex offenders. 28 C.F.R. § 72.3. On May 30, 2007, the Attorney General made the interim regulation permanent by issuing proposed guidelines. The National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30,210-01 (May 30, 2007). After revising the guidelines in response to public comment, the Attorney General issued final guidelines, which state that "SORNA applies to all sex offenders, including those convicted of their registration offenses prior to the enactment of SORNA or prior to particular jurisdictions' incorporations of the SORNA requirements into their programs." 73 Fed. Reg. 38,030-01, 38,063. As a result of these regulations, all individuals who qualify as sex offenders must register under SORNA, and the failure to do so is a criminal offense, 18 U.S.C. § 2250(a), regardless of whether or not the defendant committed the underlying sex offense prior to SORNA's passage.

B. Factual Background

In 2003, prior to SORNA's enactment, Lester Nichols was convicted of a sex offense under 18 U.S.C. § 2423. App. 2. He served a term of imprisonment and was released from prison in March 2012. While on supervised release, Mr. Nichols registered as a sex offender in Kansas and updated that registration every three months, including in October 2012. *Id.* 16. In November 2012, Mr. Nichols moved from Kansas to the Philippines. He abandoned his home in Leavenworth, traveled approximately fifteen minutes across the Missouri River to the Kansas City

(Missouri) International Airport, and flew to the Philippines. *Id.* 3, 17. In December 2012, Mr. Nichols was arrested in the Philippines, deported to California, and transported to Kansas to face the charge at issue here. *Id.*

C. Proceedings in the District Court

In June 2013, a federal grand jury in Kansas returned a one-count indictment against Mr. Nichols, charging him with failure to update his sex-offender registration in November 2012, in violation of 18 U.S.C. § 2250(a). App. 16. In October 2013, Mr. Nichols moved to dismiss the indictment on two grounds: (1) SORNA did not require him to register as a sex offender in the Philippines or to update his Kansas registration after he moved to the Philippines; and (2) Congress violated the nondelegation doctrine when it gave unconstrained discretion to the Attorney General to decide whether SORNA applies to pre-Act offenders. App. 17-20.

On the first ground, Mr. Nichols acknowledged contrary authority – *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011) – but set forth a number of reasons why *Murphy* was wrongly decided. App. 17-19. Mr. Nichols explained, *inter alia*, that: (1) a foreign country, like the Philippines, is not a "jurisdiction" covered by SORNA; and (2) SORNA requires registration where an offender "resides," not where an offender "resided." From the use of present tense verbs, and in light of Congress's intent not to extend SORNA's reach to foreign countries, Mr. Nichols asserted that, upon his relocation to the Philippines, he had no obligation to update his sex offender registration in Kansas (where his former residence was located). *Id.* Mr. Nichols noted that his position was adopted by the Eighth Circuit in *United States v. Lunsford*, 725

F.3d 859 (8th Cir. 2013), and that it was also consistent with this Court's decision in *Carr v. United States*, 560 U.S. 438 (2010).

On the second ground, Mr. Nichols asserted that Congress provided no "intelligible principle" to guide the Attorney General's discretion in determining whether SORNA should apply to pre-Act offenders. In support, he cited Justice Scalia's dissent in *Reynolds v. United States*, 132 S.Ct. 975, 986 (2012) (noting that an interpretation of SORNA to encompass pre-Act offenders "seems to me sailing close to the wind with regard to the principle that legislative powers are nondelegable") (joined by Justice Ginsburg).

The district court denied Mr. Nichols's motion. App. 24. On the first issue, the district court found itself bound by the Tenth Circuit's decision in *Murphy*. *Id.* 3, 19. On the second issue, the district court refused to credit Mr. Nichols's position because of contrary authority. *Id.* 20-23. The district court found insignificant the statement made by Justice Scalia in dissent in *Reynolds*, 132 S.Ct. at 986. *Id.* 23.

Thereafter, Mr. Nichols entered into a conditional guilty plea, preserving the right to appeal the denial of his motion to dismiss. App. 4.

D. Proceedings in the Court of Appeals

On appeal, the Tenth Circuit affirmed Mr. Nichols's conviction in a published decision. App. 1-15. On the first issue, the panel found itself bound by *Murphy*. App. 6-8. It concluded: "By boarding a plane to the Philippines, Mr. Nichols abandoned his residence in Kansas – a 'jurisdiction involved.' This change in residence triggered a registry obligation in Kansas, which Mr. Nichols did not fulfill." App. 8-9. The panel

decision acknowledged the three sources relied on by Mr. Nichols – (1) Judge Lucero's dissent in *Murphy*; (2) the Eighth Circuit's decision in *Lunsford*; and (3) this Court's decision in *Carr* – but declined to consider the merits of the arguments in light of controlling contrary authority (*Murphy*). App. 7-8.

In a short concurrence, Judge McKay disagreed with *Murphy*, agreed with Judge Lucero's dissent in *Murphy* and the Eighth Circuit's decision in *Lunsford*, and urged the full Court to consider the issue. App. 15.

On the second issue, the Court of Appeals rejected Mr. Nichols's assertion that it should apply the heightened "meaningfully constrains" standard suggested by this Court in *Touby v. United States*, 500 U.S. 160, 165 (1991). App. 9, 12-13. With no analysis whatsoever, the Court of Appeals rejected this heightened standard because the Third Circuit recently rejected it. App. 12-13 (citing *United States v. Cooper*, 750 F.3d 263, 272 (3d Cir.), *cert. denied*, 135 S.Ct. 209 (2014)). Applying the "intelligible principle" standard, the Court held that Congress "clearly delineated the general policy upon which SORNA is based," "clearly delineated . . . the Attorney General as the executive official to whom it delegated authority under SORNA," and "clearly delineated the boundaries of the authority it delegated to the Attorney General." App. 10-11.

By a vote of 8 to 4,[1] the Tenth Circuit, in a published order, declined to rehear the case en banc. App. 25. Judges Lucero and Gorsuch authored separate dissents.

Judge Lucero, echoing his dissent in *Murphy*, opined that rehearing en banc was

[1] Judge McKay, as a senior judge, did not participate in the en banc proceedings. App. 25.

necessary to address the circuit split between the Eighth and Tenth Circuits on the applicability of SORNA's registration requirements to offenders who move to a foreign country. App. 27. "Correcting this circuit split is a matter of exceptional importance given the express purpose of Congress in enacting SORNA to remedy 'a wide disparity among State registration requirements and notification obligations for sex offenders.'" *Id.* Judge Lucero explained that the conflict in the circuits creates the very type of disparity SORNA was meant to eliminate, thus thwarting congressional intent and needlessly complicating an already complicated law. *Id.*

Judge Gorsuch agreed. App. 29 ("A circuit split lingers here."). He urged this Court to review the decision in this case:

> In denying rehearing today to reconsider this court's position in light of *Lunsford*'s teaching, we leave those who seek a resolution of the circuit split to travel other avenues. *Murphy* and *Lunsford* articulate both sides of the split admirably and there's no need for further amplification here, only resolution somewhere.

Id.

Judge Gorsuch also wrote extensively on why Congress's delegation to the Attorney General to decide whether SORNA applies to hundreds of thousands of pre-Act offenders violates the nondelegation doctrine. App. 29-49. His basic point: "If the separation of powers means anything, it must mean that the prosecutor isn't allowed to define the crimes he gets to enforce." *Id.* 29. Judge Gorsuch also called into question the use of the "intelligible principle" standard in the context of criminal statutes, instead suggesting that a "stricter rule would apply." *Id.* 39-42. In the end, in Judge Gorsuch's view, because Congress provided no guidance whatsoever to the Attorney General on whether SORNA should reach pre-Act offenders, the delegation was

unconstitutional. *Id.* 42-49.[2]

This timely petition follows.

REASONS FOR GRANTING THE WRIT

I. The Courts Of Appeals Are Split Over Whether SORNA Applies to Sex Offenders Who Move To Foreign Jurisdictions.

An established conflict exists between the Eighth and Tenth Circuits over the meaning of the term "resides" in 42 U.S.C. § 16913. This conflict creates a disparate application of SORNA, which was enacted to promote uniformity, in the thirteen states within the Eighth and Tenth Circuits, and also creates uncertainty in the other thirty-seven states and federal territories as to whether SORNA applies to offenders who move to foreign jurisdictions. This Court should resolve this conflict.

A. There Is An Entrenched Conflict Within The Circuits On SORNA's Application To Offenders Who Move To Foreign Jurisdictions.

A sex offender is required to "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. § 16913(a). Foreign countries, like the Philippines, are not "jurisdictions" within SORNA's reach. 42 U.S.C. § 16911(10). As Judge Lucero explained, an "Eighth Circuit decision creates a circuit split [with the Tenth Circuit] regarding the applicability of SORNA's notice provisions to offenders who leave the country." App. 27.

In 2011, in *Murphy*, the Tenth Circuit held that a sex offender who abandons his residence and moves to a foreign jurisdiction must still register in the abandoned

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[2] Judge Lucero agreed with Judge Gorsuch on these points and would have addressed this issue en banc as well. App. 28.

jurisdiction. 664 F.3d at 799. Judge Lucero dissented in *Murphy*, explaining, *inter alia*, that the plain language of the statutory provisions requires registration where an offender "resides," not where an offender "resided." *Id.* at 805-06. In his view, a sex offender who moves to a foreign jurisdiction has no obligation to update a registration in the jurisdiction abandoned by the sex offender. *Id.*

In 2013, in *Lunsford*, the Eighth Circuit, consistent with Judge Lucero's dissent in *Murphy*, held that a sex offender who abandons his residence and moves to a foreign jurisdiction is not required to register in the abandoned jurisdiction. 725 F.3d at 862. In doing so, the Eight Circuit cited this Court's decision in *Carr* for the proposition that a verb in the present tense, like "resides," "generally does not include the past." *Id.* at 861. The Eighth Circuit "respectfully disagree[d]" with the Tenth Circuit's decision in *Murphy*:

> But insofar as *Murphy* concluded that an offender who leaves a domestic jurisdiction for a foreign jurisdiction necessarily must update his registration in the domestic jurisdiction where he formerly resided, we respectfully disagree. According to the statute, a jurisdiction is a "jurisdiction involved" only if the offender resides, works, or studies there "after [a] change of . . . residence."

Id. at 862. Without a doubt, *Lunsford* is in direct conflict with *Murphy*.

In this case, a panel of the Tenth Circuit found itself bound by *Murphy*. App. 8. In doing so, the panel noted the Eighth Circuit's decision in *Lunsford*, but refused to address it on the merits. App. 8. The panel also refused to reconsider *Murphy* in light of this Court's decision in *Carr*, noting that a later Tenth Circuit decision held that *Carr* did "not dictate an alternative conclusion' to the conclusion reached in *Murphy*." App. 8 (quoting *United States v. Lewis*, 768 F.3d 1086, 1091 n.4 (10th Cir. 2014)).

In a short concurrence, Judge McKay wrote "separately to express disagreement with the majority in *Murphy*, agreement with the dissent in *Murphy* by Judge Lucero, and [his] belief that consideration of this case by the full en banc court would be appropriate." App. 16. Judge McKay further noted his agreement with the Eighth Circuit's decision in *Lunsford*. *Id.*

Despite the conflict with the Eighth Circuit, and despite the conflict within the Tenth Circuit itself, the Tenth Circuit declined to rehear the instant case en banc. App. 25. Of the twelve active judges, four voted to rehear the case en banc (Judges Lucero, Gorsuch, Matheson, and Moritz). In dissent, Judge Lucero expressed his continued "view that *Murphy* was incorrectly decided." App. 27. "Correcting this circuit split is a matter of exceptional importance given the express purpose of Congress in enacting SORNA to remedy 'a wide disparity among State registration requirements and notification obligations for sex offenders." *Id.* In a separate dissent, Judge Gorsuch urged resolution of this conflict as well:

> In denying rehearing today to reconsider this court's position in light of *Lunsford*'s learning, we leave those who seek a resolution of the circuit split to travel other avenues. *Murphy* and *Lunsford* articulate both sides of the split admirably and there's no need for further amplification here, only resolution somewhere.

Id. 29.

With the Tenth Circuit's denial of Mr. Nichols's petition for rehearing en banc, the conflict in the circuits on this issue is firmly entrenched. The Eighth Circuit believes that the Tenth Circuit is wrong. *Lunsford*, 725 F.3d at 862. The Tenth Circuit has refused to reconsider its position despite the Eighth Circuit's contrary decision in

Lunsford. App. 8, 25. Both courts adhere firmly to their positions, and it is clear that neither intends to alter course. To reiterate the words of Judge Gorsuch below: "*Murphy* and *Lunsford* articulate both sides of the split admirably and there's no need for further amplification here, only resolution somewhere." App. 29. That somewhere is this Court, as only this Court can resolve this conflict. Only this Court can bring uniformity to a law intended to do just that. For this reason, this Court should grant this petition and resolve the conflict that exists in the lower courts.

B. Resolution Of This Question Is Critically Important To The Viability Of SORNA's Registration System.

Congress enacted SORNA to establish "a comprehensive national system for the registration of" sex offenders. 42 U.S.C. § 16901. As Judge Lucero rightly concluded below, "[c]orrecting this circuit split is a matter of exceptional importance given the express purpose of Congress in enacting SORNA to remedy 'a wide disparity among State registration requirements and notification obligations for sex offenders.'" App. 27.

Resolving whether a sex offender who moves to a foreign jurisdiction must still update a registration in a former jurisdiction is essential to Congress's goal of establishing a uniform, comprehensive national sex offender registry. At present, a sex offender who lives on the Missouri side of State Line Road, for instance, is under no obligation to update his registration in Missouri if he abandons his home, boards a plane, flies to the Philippines, and establishes a residence there. *Lunsford*, 725 F.3d at 862. Yet a sex offender directly across the street, on the Kansas side of State Line Road, must update his registration in Kansas if he abandons his home, boards a

plane, flies to the Philippines, and establishes a residence there. App. 8-9. This type of disparate treatment of identical conduct is precisely what SORNA is designed to eliminate. 42 U.S.C. § 16901. Because of the conflict at issue in this case, Congress's goal of a national sex offender registry has failed.

Judge Lucero made an analogous point in dissent below, focusing starkly on the disparate treatment of offenders based on something as arbitrary as geographical location:

> The facts of *Lunsford* and this case illustrate why our current jurisprudence runs directly against the stated intent of Congress. In both cases, the appellants moved directly from the Kansas City metropolitan area to the Philippines. Lunsford had lived in the Missouri side of the metropolis and was not required to update his Missouri registration to reflect his move out of the county. But Nichols, who had lived just across the river in Kansas, was brought back to the United States and sentenced to prison for failing to update his Kansas registration. We have simply replaced a 'wide disparity among State registration requirements' with a wide disparity among Circuit registration requirements. In doing so, we thwart the intent of Congress and needlessly complicate an already complicated law.

App. 27 (citations omitted).

A similar disparity arises with respect to offenders who reside in foreign jurisdictions. For instance, two sex offenders could live in the same residence in a foreign country, with one having to register in the former jurisdiction, and the other not, depending on the state in which each offender formerly resided. Congress could not have meant SORNA's application to differ in such circumstances. Nor is it acceptable to treat such similarly situated individuals in opposite ways.

As a practical matter, the conflict in the circuits also allows offenders to game the sex offender registration system. Had Mr. Nichols moved the short distance from

Kansas to Missouri, registered as a sex offender in Missouri, habitually lived in Missouri for the requisite thirty days, then flew to the Philippines to reside, his conviction could not stand in light of *Lunsford*. But because he traveled to Missouri without residing there, his conduct – flying to the Philippines from an airport in Missouri – is considered criminal in light of *Murphy* and the decision in this case. Identical conduct, by similarly situated sex offenders, is either criminal or not depending on the offender's former residence.

Although none of the other courts of appeals have weighed in on the entrenched conflict between the Eighth and Tenth Circuits, states within those circuits suffer serious uncertainty as a result of the conflict. Without resolution of the conflict, states are left to guess as to whether the Eighth or Tenth Circuit has the better of the argument. Consider Montana, which borders both the Eighth and Tenth Circuits. Do Montana officials require offenders like Mr. Nichols to register, as the Tenth Circuit holds, or do they not require registration, as the Eighth Circuit holds? Does an offender living in the Philippines, who formerly registered in Montana, return to Montana to update his registration, as the Tenth Circuit requires, or does he not return to Montana to update his registration? This lack of notice raises serious constitutional concerns. *See, e.g.*, *United States v. Lanier*, 520 U.S. 259, 267 (1997) (stating, "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed").

The conundrum faced by jurisdictions outside of the Eighth and Tenth Circuits highlights the substantial importance of this issue. The uncertainty caused by the

conflict not only threatens nationwide uniformity, but also calls into serious question SORNA's application in these jurisdictions. Clarity and notice of SORNA's requirements would be welcomed by all parties, including federal prosecutors who must decide whether to embark on the expensive task of returning someone from halfway across the globe to face, as here, a SORNA registration prosecution. Given that the number of sex offenders is estimated to be in the hundreds of thousands, scarce federal resources will continue to be expended in the other jurisdictions (including the other thirty-seven states) that have yet to decide what the Eighth and Tenth Circuits have been unable to agree upon.

Finally, the public, and not simply sex offenders or those who monitor sex offenders, need to have faith that justice is dispensed fairly and evenly to all. Just as no one is above the law, no one should be able to avoid it or be subject to it simply by dint of their past geographical location. Either SORNA's registration requirement applies to those who choose to reside overseas or it does not. But it should not apply to some and not to others. Whichever interpretation of "resides" carries the day, this Court should decide this issue now, not later.

C. The Tenth Circuit Erred In Holding That Sex Offenders Who Move To Foreign Jurisdictions Must Update Registrations In Former Jurisdictions.

Contrary to the Tenth Circuit's holding, SORNA does not require a sex offender who moves to a foreign country to update a registration where he formerly resided. *Lunsford*, 725 F.3d at 862; App. 27 (Gorsuch, J., dissenting).

1. **By its plain terms, a sex offender need only register where he "resides," not where he "resided."**

Because this is an issue of statutory interpretation, the starting point is the language of the relevant statutory provisions. *Dean v. United States*, 556 U.S. 568, 572 (2009). That language requires each sex offender to "register, and keep the registration current, in each jurisdiction where the offender *resides*, where the offender *is* an employee, and where the offender *is* a student." 42 U.S.C. § 16913(a) (emphases added). "Resides" is defined as "the location of the individual's home or other place where the individual habitually lives." 42 U.S.C. § 16911(13). "Jurisdiction" is limited to federal lands (the fifty states, the District of Columbia, etc.). 42 U.S.C. § 16911(10).

Under SORNA's plain language, then, an individual need not register as a sex offender in a jurisdiction where he used to reside (or resided). Instead, a sex offender need only register in the jurisdiction where he "resides," or "habitually lives." Moreover, SORNA does not require registration in foreign countries. As such, when an individual moves to a foreign country, like the Philippines, he has no obligation to continue to register as a sex offender under SORNA as long as he lives outside of the United States. *Lunsford*, 725 F.3d at 861; App. 27 (Lucero, J., dissenting). Thus, when Mr. Nichols moved from Kansas to the Philippines, he had no duty to register or update his registration.

Congress's use of present tense verbs in § 16913(a) confirms this plain reading of the statute. In *Carr*, this Court, in interpreting § 2250(a) (the statute of conviction in this case), found significant Congress's use of present tense verbs. 560 U.S. at 448-

50. "[T]he present tense generally does not include the past." *Id.* at 448 (citing the Dictionary Act, 1 U.S.C. § 1 – "words used in the present tense include the future as well as the present."). This Court held that, because § 2250(a) regulates a person who "travels," the statute's reach did not encompass a person whose only travel occurred before the statute took effect. *Id.* In reaching this conclusion, this Court found significant the statutory context and, in particular, the fact that the word "travels" was followed "by a series of other present tense verbs." *Id.* at 449. The "undeviating use of the present tense [is] a striking indicator of its prospective orientation." *Id.* (quotations omitted).

The same analysis applies here, as § 16913(a) also includes a series of present tense verbs ("resides," "is an employee," "is a student"). Moreover, the use of the present tense in § 2250(a) confirms that Congress meant to require registration only in jurisdictions where offenders reside, not in jurisdictions where offenders used to reside. *Carr*, 560 U.S. at 449-50. Indeed, in rejecting the government's argument in *Carr* that "travels" meant "traveled," the Court noted that

> the only way to avoid an incongruity among neighboring verbs would be to construe the phrase 'resides [in] Indian country' to encompass persons who once resided in Indian country but who left before SORNA's enactment and have not since returned – an implausible reading that neither the Seventh Circuit, nor the Government, nor the dissent endorses.

Id. In other words, this Court has already recognized the implausibility of interpreting "resides" as "resided" in the context of SORNA. By adopting this implausible interpretation, the Tenth Circuit erred.

2. Other related provisions confirm that an offender must register, and update a registration, where he "resides," not where he "resided."

In § 16913(c), Congress requires, *inter alia*, a sex offender to update a registration "not later than 3 business days after each change of . . . residence." (emphasis added). Moreover, the offender must "appear in person in at least 1 jurisdiction involved" in order to update the registration. *Id.* And foreign countries, like the Philippines, are not considered involved jurisdictions for purposes of SORNA. 42 U.S.C. § 16911(10).

The inclusion of the requirement that an offender must update a registration "after" he changes his residence conforms with § 16913(a)'s requirement that he register where he "resides." In plain terms, the statutes require an offender who moves from one jurisdiction to another to register in the latter, not the former, jurisdiction. This becomes even more obvious when one considers that registration must be "in person." 42 U.S.C. § 16913(c). It strains credulity to think that an offender who moves from one jurisdiction to another would have to return to the former jurisdiction to register as a sex offender. Indeed, such a reading of the statute is untenable when a sex offender moves to a foreign country not covered by SORNA (like the Philippines). In that instance, the offender would have to return to the United States "within 3 business days" to register and update a registration "in person" "after" any change of residence.

If the Tenth Circuit is correct, "after" Mr. Nichols moved to the Philippines, he had "3 business days" to report "in person" in Kansas to update his change of residence. Practically speaking, upon his arrival in the Philippines, Mr. Nichols would have had to return immediately to update a registration form in Kansas. And,

if Mr. Nichols afterwards changed residences in the Philippines, or perhaps moved to a different foreign country, "within 3 business days," he would have to return to Kansas again to update his registration.

Such a reading of the statute is implausible. The better reading is the one advanced by the Eighth Circuit in *Lunsford* and Judge Lucero in his dissents in *Murphy* and this case. That reading is also consistent with the statutory text enacted by Congress. An offender must register, and update a registration, in the jurisdiction in which he "resides." A straightforward application of the statutory text avoids the absurd results engendered by the Tenth Circuit's position.

Moreover, the phrase "jurisdiction involved" in § 16913(c) is qualified by the last sentence of that subsection to require that registration information be provided "to all other jurisdictions in which the offender *is required to* register." 42 U.S.C. § 16913(c) (emphasis supplied). Because the Philippines is not a "jurisdiction" or a "jurisdiction involved" in which "the offender is required to register," it was never Congress's intent to require an offender who lives in a foreign country to continue to register. Even the Tenth Circuit admits as much. *Murphy*, 664 F.3d at 804 ("we clarify that SORNA does not create new reporting obligations for sex offenders living abroad.").

Finally, in 42 U.S.C. § 16928, Congress ordered the Attorney General to establish a system to identify "persons entering the United States who are required to register under this subchapter." This provision is consistent with the position that an offender does not register until "after" a change in residence, and the registration must occur

where the offender "resides," not where the offender formerly "resided." Section 16928 also indicates that Congress chose not to exercise its extraterritorial jurisdiction over offenders who live in foreign countries, as do the National Guidelines, which recognize that a sex offender "may pass beyond the reach of U.S. jurisdictions and hence may not be subject to any enforceable registration requirement under U.S. law unless and until he or she returns to the United States." 73 Fed. Reg. 38,030-01, 38,066.

3. SORNA's purpose confirms that offenders who move to a foreign country need not register or update a registration.

Again, Congress enacted SORNA to bring uniformity to the varied state sex offender registry systems. *See* 42 U.S.C. § 16901. SORNA's stated purpose is "to protect the public from sex offenders" by establishing a "comprehensive national system for the registration of those offenders." 42 U.S.C. § 16901. Again, the National Guidelines recognize that a sex offender who moves to a foreign country passes beyond the reach of SORNA unless and until he returns to the United States. 73 Fed. Reg. 38,030-01, 38,066.

In enacting SORNA, Congress did not intend SORNA as a proscription on one's right to travel; instead, Congress understood that sex offenders would move from jurisdiction to jurisdiction, and sought to regulate, not prohibit, that movement. That interstate freedom of movement is why state registry systems developed, and why Congress saw the need to bring uniformity to them via a national registry system. Under the Tenth Circuit's interpretation, however, an offender who resides in a foreign country must still register with his former jurisdiction, even though he now

resides in a jurisdiction Congress did not intend to reach. This is not what Congress envisioned when it enacted SORNA.

4. **If nothing else, the rule of lenity requires that this Court interpret SORNA in Mr. Nichols's favor.**

As explained above, the plain terms of the statutory provisions do not require sex offenders who move to foreign countries to update registrations in jurisdictions from which they moved. Yet, to the extent that the statutory provisions are considered ambiguous, that ambiguity must be resolved in Mr. Nichols's favor. "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985). As Justice Scalia recently remarked, the rule of lenity "vindicates the principle that only the legislature may define crimes and fix punishments. Congress cannot, through ambiguity, effectively leave that function to the courts – much less to the administrative bureaucracy." *Whitman v. United States*, 135 S. Ct. 352, 354 (2015) (Scalia, J., statement respecting denial of certiorari, joined by Thomas, J.). If nothing else, Mr. Nichols prevails in light of the rule of lenity.

D. This Case Is An Excellent Vehicle For Resolving The Circuit Split.

Finally, this case presents an ideal opportunity for this Court to review this issue. Mr. Nichols raised the issue in the district court and on appeal. Both the district court and a panel of the Tenth Circuit, on de novo review, addressed the issue on the merits. The full Tenth Circuit denied Mr. Nichols's petition for rehearing en banc in a published decision over two dissents, both of which urge resolution of the split

between the Eighth and Tenth Circuits.

The issue is exceptionally important because the conflict undermines the purpose of SORNA's uniform, comprehensive national sex offender registry system. As importantly, the issue involves an entrenched conflict within the courts of appeals. To quote Judge Gorsuch one last time: "*Murphy* and *Lunsford* articulate both sides of the split admirably and there's no need for further amplification here, only resolution somewhere." App. 29.

In the end, there are no procedural hurdles to overcome, and the particular issue raises a substantial issue of statutory interpretation that has split the lower courts. This case warrants this Court's review.

II. This Court Should Resolve Whether And Under What Standard Congress Can Constitutionally Delegate Its Legislative Authority To The Attorney General To Define The Scope Of A Criminal Law.

Mr. Nichols's case also presents this Court with an excellent opportunity to decide another issue of exceptional importance: whether Congress's delegation to the Attorney General to determine SORNA's reach violates the nondelegation doctrine.

In 42 U.S.C. § 16913(d), Congress delegated to the Attorney General not simply how to implement SORNA, but to decide whether it applies to hundreds of thousands of pre-Act offenders. In Judge Gorsuch's blunt words below, SORNA's delegation to the Attorney General "doesn't just grant some alphabet soup agency the power to write rules about the chicken trade. It invests in the nation's chief prosecutor the authority to devise a criminal code governing a half-million people." App. 30.

Separation of powers – the principle offended in this case – is a concept that

predates even the Constitution. *Loving v. United States*, 517 U.S. 748, 756 (1996). Indeed, it is the underlying concept of "our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). "The very structure of the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers . . . ." *INS v. Chadha*, 462 U.S. 919, 946 (1983). This Court "consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta*, 488 U.S. at 380.

In this regard, the Constitution vests "[a]ll legislative Powers" with Congress, U.S. Const. Art. I, § 1, while the Executive Branch "shall take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3. Accordingly, while "defining crimes and fixing penalties are legislative . . . functions," *United States v. Evans*, 333 U.S. 483, 486 (1948), it is the Executive Branch that has the "absolute right" to prosecute, *Ex Parte United States*, 287 U.S. 241, 251 (1932); *see also Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 755 (5th Cir. 2001) ("No function cuts more to the heart of the Executive's constitutional duty to take care that the laws are faithfully executed than criminal prosecution."). As Judge Gorsuch explained below:

> By separating the lawmaking and law enforcement functions, the framers sought to thwart the ability of an individual or group to exercise arbitrary or absolute power. And by restricting lawmaking to one branch and forcing any legislation to endure bicameralism and presentment, the framers sought to make the task of lawmaking more arduous still. These structural impediments to lawmaking were no bugs in the system but the point of the design: a deliberate and jealous effort to preserve room for individual liberty.

App. 34-35.

There is a doctrine – the nondelegation doctrine – that ensures that the principle of separation of powers remains intact. *See, e.g., DOT v. Ass'n of Am. Railroads*, 135 S.Ct. 1225, 1237 (2015) (Alito, J., concurring) ("The principle that Congress cannot delegate away its vested power exists to protect liberty."). It is that doctrine that prohibits Congress from delegating to the Executive Branch the power to define the reach of § 2250(a) to include pre-Act offenders.

A. This Court Should Resolve Whether Greater Specificity Is Required When Congress Delegates Its Legislative Authority To Define The Reach Of A Criminal Statute To Another Branch Of Government.

The nondelegation doctrine often finds application in the administrative or regulatory context, where this Court has held that Congress cannot, within constitutional limits, delegate its legislative authority to another branch of the government without sufficient guidance. *See, e.g., Mistretta*, 488 U.S. at 372. If Congress seeks assistance from the other branches, that assistance must be based on "common sense and the inherent necessities of government coordination." *Id.* (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928)). Any such delegation in this context (the administrative or regulatory), be it in the form of promulgating rules or creating laws, must be informed by an "intelligible principle" to which the other branch is directed to conform. *Id.* An intelligible principle is constitutionally sufficient if "Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of the delegated authority." *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

The cases make clear that the nondelegation doctrine is one of universal reach. It applies to all walks of legislative actions. *See Mistretta*, 488 U.S. at 373-74 (collecting cases). Yet, as Judge Gorsuch persuasively explained below, the doctrine must hold more force, and require greater specificity, when the issue involves the delegation of power to define crimes or criminal sanctions. App. 39-40. It cannot be enough that such delegations are informed by an "intelligible principle." It was over two decades ago that this Court left that issue unanswered in *Touby v. United States*. 500 U.S. at 165-66. It is a question that needs an immediate answer from this Court.

The courts of appeals have candidly conceded that SORNA's pre-Act-offender delegation fails to set meaningful restraints on the Attorney General's authority. *See, e.g., United States v. Goodwin*, 717 F.3d 511, 517 (7th Cir. 2013) ("SORNA sets clear boundaries on the Attorney General's exercise of discretion in virtually every respect, with the exception of the provision at issue in this case.") The Solicitor General has essentially admitted as much on a prior occasion.[3]

The Tenth Circuit's analysis confirms this point. Below, the Tenth Circuit applied the "intelligible principle" standard from the administrative and regulatory context. App. 10. It found the delegation sufficient because Congress set forth a general policy (a national sex offender registry), delegated its authority to a specific agent (the Attorney General), and delegated a single, narrow decision to that agent (whether SORNA applies to pre-Act offenders). *Id.* 10-11.

In practice, this analysis permits Congress to abdicate its crime-defining function

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[3] *See* Brief for the United States, *Reynolds v. United States*, No. 10-6549, at 24-25, available at http://www.justice.gov/sites/default/files/osg/briefs/2010/01/01/2010-6549.mer.aa.pdf

to the Executive Branch. All Congress needs to do to avoid its constitutional duties is to state a policy ("crime is bad"), delineate an agent ("the Attorney General"), and place minimal boundaries on the delegation ("only decide whether it is criminal to do X"). The only plausible way in which this logic is sound (and it is not sound even in this respect) is if the authority to delegate the reach of a criminal statute suffices under the same standard as the authority to delegate non-criminal regulatory functions to a different Branch. That is an issue this Court has not expressly resolved, *Touby*, 500 U.S. at 165-66, but it is one that this Court should resolve.

Decisions of this Court indicate that the delegation of criminal penalties are subject to greater specificity. *See, e.g., Fahey v. Mallonee*, 332 U.S. 245, 250 (1947) ("But the provisions of the statute under attack are not penal provisions . . . . The provisions are regulatory."); App. 11 (acknowledging that "the Court has repeatedly and long suggested that in the criminal context Congress must provide more 'meaningful[]' guidance than an 'intelligible principle.'"). Yet below, instead of requiring greater specificity or more meaningful guidance, the Tenth Circuit required none at all. App. 10-11.

It is one thing for Congress to seek guidance on non-criminal regulations; it is quite another for Congress to delegate the reach of a criminal provision to the branch of government charged with prosecuting those who violate that provision. Can the Executive Branch both define the reach of a criminal statute, and then prosecute those who fall within that reach? And, even if this is proper, can it happen with no guidance from Congress? Whatever the answer, the ultimate question of specificity

should be addressed, and resolved, by this Court.

B. The Tenth Circuit Erred When It Held That Congress's Delegation To The Attorney General In § 16913(d) Is Constitutional.

Contrary to the Tenth Circuit's decision, Congress cannot delegate its legislative authority to define the reach of SORNA's criminal sanctions to the Executive Branch without meaningful constraints. In *Reynolds*, this Court held that SORNA, by its own terms, does not extend to pre-Act offenders like Mr. Nichols; rather, SORNA extends to such offenders only in light of § 16913(d)'s delegation to the Attorney General and the Attorney General's subsequent decision to include pre-Act offenders within SORNA's reach. 132 S.Ct. at 978. This holding prompted this comment in dissent by Justice Scalia, joined by Justice Ginsburg:

> it is not entirely clear to me that Congress can constitutionally leave it to the Attorney General to decide – with no statutory standard whatever governing his discretion – whether a criminal statute will or will not apply to certain individuals. That seems to me sailing close to the wind with regard to the principle that legislative powers are nondelegable.

Id. at 986. In dissent below, Judge Gorsuch went further: "as it turns out, the statute doesn't just sail close to the wind. It sails right into it." App. 33.

Cases from this Court on the delegation of criminal penalties support Judge Gorsuch's conclusion that SORNA's application to pre-Act offenders violates the nondelegation doctrine. *See, e.g.*, *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529, 542-43 (1935) (holding that Congress could not delegate to the Executive the power to approve codes of fair competition promulgated by trade associations, when the "[v]iolations of the provisions of the codes are punishable as crimes"); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (holding, with respect to legislation

providing for criminal sanctions, that Congress unconstitutionally delegated its legislative power to the Executive Branch); *United States v. George*, 228 U.S. 14, 20-22 (1913) (rejecting government's argument that federal agency could promulgate regulations creating a federal crime to fail to abide by agency requirements).

As Judge Gorsuch forcefully demonstrated below, § 16913(d) does not define or circumscribe the Attorney General's discretion with respect to the reach of SORNA's criminal provision to pre-Act offenders. App. 31, 48-49. In fact, it offers no guidance whatsoever for how the Attorney General ought to exercise her authority in this regard. *Id.* There is little in the way of intelligible guiding principles anywhere at all in SORNA, much less anything in the way of specific standards or explicitly defined limitations on the Executive's discretion. And, as in the cases cited above, this point is doubly important because SORNA creates a federal crime for which the Executive has the ability to define its reach, then prosecute those within that reach.

Those cases further confirm what Justices Scalia and Ginsburg suggest in their dissent in *Reynolds*, and what Judge Gorsuch proves in dissent below: that Congress's delegation of its legislative powers in § 16913(d) violates the Constitution's nondelegation doctrine. 132 S.Ct. at 986. That delegation fails to place any meaningful boundaries on the Attorney General's discretion in that the Attorney General can determine whether none, some, or all pre-Act offenders fall under SORNA's reach. *See United States v. Hinckley*, 550 F.3d 926, 948 (10th Cir. 2008) (Gorsuch, J., concurring). Because Congress unlawfully delegated this authority in § 16913(d) to the Attorney General, that delegation should be stricken as

unconstitutional, and pre-Act offenders should not be subject to the criminal penalties in 18 U.S.C. § 2250(a).

C. This Case Is An Excellent Vehicle For Deciding This Exceptionally Important Question.

Mr. Nichols challenged the constitutionality of Congress's delegation to the Attorney General in § 16913(d) in both the district court and the court of appeals. Both courts rejected the argument, under de novo review. The Tenth Circuit refused to consider the issue en banc, over the dissents of two judges. The issue is ripe for review. No procedural hurdles stand in the way.

Moreover, at present, hundreds of thousands of pre-Act offenders like Mr. Nichols are subject to imprisonment if they fail to register or update their sex offender registrations. They are subject to imprisonment only because the Attorney General has said that they should be subject to imprisonment. *Reynolds*, 132 S.Ct. at 978. The constitutionality of this delegation is one this Court has not yet considered. In Judge Gorsuch's words, "[t]he day to decide [the issue] is now upon us." App. 33.

CONCLUSION

For the above-stated reasons, this Court should grant this petition to review the Tenth Circuit's judgment in this case.

Respectfully submitted,

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FILED
United States Court of Appeals
Tenth Circuit

December 30, 2014

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LESTER RAY NICHOLS,

Defendant - Appellant.

No. 14-3041

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 6:13-CR-10106-JTM-1)

Timothy J. Henry, Assistant Public Defender (Melody Brannon Evans, Federal Public Defender, with him on the briefs), Office of the Federal Public Defender, Wichita, Kansas, for Appellant.

James A. Brown, Assistant United States Attorney (Barry R. Grissom, United States Attorney, with him on the brief), Office of the United States Attorney, Topeka, Kansas, for Appellee.

Before **McHUGH, McKAY,** and **BALDOCK,** Circuit Judges.

McHUGH, Circuit Judge.

I. INTRODUCTION

Lester Nichols is a convicted sex offender who left the United States without updating his status on the federal sex offender registry. He was brought back to the United States and charged with failing to register, in violation of the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250(a). On appeal, he challenges his conviction based on two theories: (1) SORNA's updating requirement does not apply in situations like his where the sex offender moves from a SORNA jurisdiction to a non-SORNA jurisdiction, and (2) SORNA's delegation of authority to the Attorney General to determine SORNA's retroactive application is unconstitutional. We reject both arguments and therefore affirm Mr. Nichols's conviction.

II. BACKGROUND

In 2003, Mr. Nichols was convicted of traveling interstate with the intent to engage in sex with a minor, in violation of 18 U.S.C. § 2423(b). He was sentenced to 120 months imprisonment. Although Mr. Nichols's conviction occurred before SORNA's 2006 enactment, the U.S. Attorney General issued a rule in 2007 extending the requirements of SORNA "to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. § 72.3. This rule was issued pursuant to the authority Congress delegated to the Attorney General under SORNA. *See* 42 U.S.C. § 16913(d) ("The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . ."). Mr. Nichols, as a

preenactment sex offender, is thus required to comply with SORNA's registration requirements.

By 2012, Mr. Nichols had been released from prison and was placed under federal supervision in the District of Kansas. Up until that time, he had complied with both the Kansas and SORNA sex offender registration requirements. In November 2012, Mr. Nichols took a plane from Kansas City to Manila, Philippines, without updating his sex offender registry. One month later, he was arrested by Philippine law enforcement officers and was turned over to State Department custody for deportation to the United States. Mr. Nichols was charged with and indicted for one count of failure to update a registration as required by SORNA. *See* 18 U.S.C. § 2250(a).

Mr. Nichols moved to dismiss the indictment. He argued before the district court that SORNA did not require him to register as a sex offender while he was in the Philippines because, once in the Philippines, he did not reside in a U.S. jurisdiction. Mr. Nichols also contended SORNA's delegation of authority to the Attorney General to determine SORNA's application to preenactment sex offenders like him is unconstitutional.

The district court rejected Mr. Nichols's first argument in light of *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011), where we held that a defendant violated SORNA when he moved from Utah to Belize without updating his status on the sex offender registry. The district court also rejected Mr. Nichols's nondelegation argument. The court acknowledged the lack of binding Tenth Circuit precedent addressing this issue, but

noted our observation in dicta that SORNA's registration provision does not violate the nondelegation doctrine. *United States v. Carel*, 668 F.3d 1211, 1214 (10th Cir. 2011). The district court also looked to *United States v. Rickett*, 535 F. App'x 668 (10th Cir. 2013) (unpublished), wherein we rejected a nondelegation argument under plain error review because, absent controlling precedent, application of SORNA to a preenactment offender was not plainly unconstitutional. Finally, the district court explained that the clear weight of authority from other circuits has rejected nondelegation challenges to 42 U.S.C. § 16913(d). Accordingly, the district court ruled SORNA's delegation of authority under § 16913(d) is not unconstitutional and denied Mr. Nichols's motion to dismiss. Mr. Nichols thereafter entered a conditional guilty plea, reserving the right to appeal both issues. He now does so and we exercise our jurisdiction under 28 U.S.C. § 1291.

III. DISCUSSION

Mr. Nichols appeals both elements of the district court ruling. He first contends SORNA's requirement that an offender keep his registration current does not apply to offenders who change their residence to a non-SORNA jurisdiction. In so arguing, he asks us to overturn our precedent in *United States v. Murphy*, wherein we held, "a sex offender, upon changing his residence, [must] update his registration in a jurisdiction involved . . . even if he did not establish a new residence in a SORNA jurisdiction." 664 F.3d 798, 803 (10th Cir. 2011). Mr. Nichols alternatively argues we should vacate his conviction on the basis that 42 U.S.C. § 16913(d) creates an unconstitutional delegation of authority by permitting the Attorney General to determine SORNA's application to

preenactment sex offenders. These issues "involve statutory interpretations of and constitutional challenges to SORNA," which we review de novo, "interpreting the words of the statute in light of the purposes Congress sought to serve." *United States v. Hinckley*, 550 F.3d 926, 928 (10th Cir. 2008) (brackets and internal quotation marks omitted), *abrogated on other grounds by Reynolds v. Unites States*, 132 S. Ct. 975 (2012).

A. Extraterritorial Changes of Residence under SORNA

SORNA requires sex offenders to "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. § 16913(a). SORNA defines "jurisdiction" as including U.S. states, territories, and Indian reservations, but not foreign nations. *Id.* § 16911(10). It defines "resides" as "the location of the individual's home or other place where the individual habitually lives." *Id.* § 16911(13). When a sex offender has a change of residence, he "keep[s] the registration current" by "not later than 3 business days after each change of . . . residence . . . appear[ing] in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform[ing] that jurisdiction of all changes in the information required for that offender in the sex offender registry." *Id.* § 16913(c). In regard to his residence, the sex offender must provide for the registry "[t]he address of each residence at which the sex offender resides or will reside." *Id.* § 16914(a)(3). Mr. Nichols argues the plain language of these SORNA provisions indicates that the

requirement to "keep the registration current" does not apply to sex offenders who have a change of residence to a non-SORNA jurisdiction.

We squarely addressed this issue in *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011). The defendant in *Murphy* was a registered sex offender who had resided in a correctional facility in Utah, departed from Utah by bus, arrived in California, then took a taxi to Mexico, and ultimately ended up in Belize where he lived for six months. *Id.* at 799–800. Mr. Murphy was deported to the United States and was charged with and convicted of failing to update his sex offender registry, in violation of 18 U.S.C. §2250(a). *Id.* at 800. On appeal, Mr. Murphy challenged his conviction on the basis that he had no obligation to update his registration after he left a SORNA jurisdiction for a non-SORNA jurisdiction. *Id.*

We affirmed Mr. Murphy's conviction, interpreting SORNA otherwise. We interpreted the phrase "jurisdiction where the offender resides" from § 16913(a) and term "residence" as used in § 16913(c) as two different concepts—the former meaning "the state where the individual keeps his home or habitually lives" and the latter meaning "a specific dwelling place . . . where an offender habitually lives." *Id.* at 800–801. And we concluded the two terms trigger different obligations: "the offender's jurisdiction is where he must keep his registration current, while the offender's residence is a specific piece of registry information, a change of which sparks a reporting duty." *Id.* at 801.

From this interpretation, we drew three conclusions. First, "abandoning one's living place constitutes a change in residence under SORNA." *Id.* Second, "[w]hen an

offender leaves a residence in a state, and then leaves the state entirely, that state remains a jurisdiction involved." *Id.* at 803. And third, "a reporting obligation does not disappear simply because an individual manages to relocate to a non-SORNA jurisdiction before the three-day deadline for updating a registration has passed." *Id.* Applying this interpretation to Mr. Murphy's case, we ruled, "a legal obligation to update his registration attached" when Mr. Murphy left the correctional facility "while he was still in Utah, and not when he arrived in Belize." *Id.* at 804. And even though Mr. Murphy "was no longer living in Utah when his failure to register became punishable" (i.e., three days after his change of residence), "Utah remained a 'jurisdiction involved' under SORNA because it was his current jurisdiction when the reporting obligation arose." *Id.* We therefore affirmed his conviction for failure to register under § 2250(a).

Earlier this year we reaffirmed *Murphy*'s interpretation of SORNA. *United States v. Lewis*, 768 F.3d 1086, 1091–92 (10th Cir. 2014). We explained in *Lewis* that "*Murphy*'s logic [is] controlling" and concluded, "The effect of *Murphy*'s holding is that the abandonment of a permanent residence triggers a sex offender's obligation to update his registration" and "the departure district remains a 'jurisdiction involved' even after the sex offender has left the state." *Id.*

Mr. Nichols contends that *Murphy* misinterpreted SORNA and we should therefore overturn it. In so arguing, Mr. Nichols relies primarily on three sources: (1) Judge Lucero's dissenting opinion in *Murphy*, 664 F. 3d at 806, which asserted that the majority "impermissibly rejects the statutory definition of 'resides' . . . . [and] avoids

a plain text reading of the statute by giving two different meanings to the defined term 'resides'"; (2) the Eighth Circuit's opinion in *United States v. Lunsford*, 725 F.3d 859, 862 (8th Cir. 2013), which disagreed with *Murphy*'s interpretation of SORNA; and (3) the U.S. Supreme Court's decision in *Carr v. United States*, 560 U.S. 438, 447–49 (2010), which looked to the plain language of § 2250 and concluded Congress's use of present tense verbs "strongly supports a forward-looking construction" and therefore the elements of § 2250 must be met sequentially for a violation to occur.

Regardless of the merits of these arguments, we are bound by the majority opinion in *Murphy*. Indeed, one panel of this court cannot overrule the judgment of another panel "absent en banc consideration . . . [or] an intervening Supreme Court decision that is contrary to or invalidates our previous analysis." *United States v. Brooks*, 751 F.3d 1204, 1209 (10th Cir. 2014) (internal quotation marks omitted). Neither exception to our horizontal stare decisis rule is present here. Mr. Nichols attempts to characterize *Carr* as the type of contrary Supreme Court authority that would invalidate *Murphy*. But *Carr* was decided before *Murphy* and is therefore not an intervening decision. And although Mr. Nichols correctly notes that *Murphy* did not address the Supreme Court's *Carr* decision, our later *Lewis* decision did, ruling that *Carr* "does not dictate an alternative conclusion" to the conclusion reached in *Murphy*. 768 F.3d at 1091 n.4. *Murphy* is therefore controlling.

Applying *Murphy*'s interpretation of SORNA to this case, we affirm Mr. Nichols's conviction under § 2250(a). By boarding the plane to the Philippines, Mr. Nichols

abandoned his residence in Kansas—a "jurisdiction involved." This change in residence triggered a registry obligation in Kansas, which Mr. Nichols did not fulfill. Mr. Nichols therefore violated § 2250(a) by failing to update his registry in Kansas within three days of his change in residence.

B. Delegation under SORNA

Mr. Nichols alternatively argues we should vacate his SORNA conviction on the basis that SORNA's delegation of authority to the Attorney General to determine SORNA's preenactment application, 42 U.S.C. § 16913(d), is unconstitutional. Mr. Nichols insists that in applying the nondelegation doctrine to this case, we should apply a heightened "meaningful constraint" standard, instead of the more lenient "intelligible principles" standard, because Congress delegated authority under SORNA that relates to the imposition of criminal liability. We disagree both as to the relevant legal standard and the application of that standard and conclude that § 16913(d) does not violate the nondelegation doctrine.

1. The Nondelegation Doctrine

Under the U.S. Constitution, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. CONST., art. I, § 1. From this language and based on separation of powers principles, the Supreme Court "has derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Government." *Touby v. United States*, 500 U.S. 160, 165 (1991). Nonetheless, Congress may delegate authority to a different branch, and "[s]o

long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (brackets and internal quotation marks omitted). The Supreme Court has further explained that an intelligible principle exists so long as "Congress clearly delineates [1] the general policy, [2] the public agency which is to apply it, and [3] the boundaries of this delegated authority." *Id.* at 372–73.[1]

2. Delegation under 42 U.S.C. § 16913(d)

Applying this standard to SORNA, we concluded that § 16913(d) does not violate the nondelegation doctrine. The language of SORNA demonstrates, first, that Congress clearly delineated the general policy upon which SORNA is based. Section 16901 expresses the congressional policy embodied in SORNA: "to protect the public from sex

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[1] Under this standard, the Supreme Court has struck down statutes delegating power to an administrative agency on only two occasions, "one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 474 (2001) (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)). *Panama Refining Co.* and *Schechter Poultry* constitute the "outer limits" of the Supreme Court's nondelegation precedent and demonstrate the Court's reticence "to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Id.* at 474–75 (internal quotation marks omitted); *see also United States v. Rickett*, 535 F. App'x 668, 675 (10th Cir. 2013) (unpublished), *cert. denied*, 134 S. Ct. 1529 (2014) ("[T]he Supreme Court has never expressly overruled *Schechter Poultry* or *Panama Refining;* so the doctrine, even if dead, has never received a proper burial.").

offenders and offenders against children" by establishing "a comprehensive national system for the registration of those offenders." This policy statement conveys the intelligible principles upon which the Attorney General's delegated authority must be based. *See United States v. Kuehl*, 706 F.3d 917, 920 (8th Cir. 2013) (concluding that SORNA's broad policy statement contained in § 16901 is "sufficient to provide an intelligible principle for delegation"); *United States v. Goodwin*, 717 F.3d 511, 516 (7th Cir. 2013) (explaining that § 16901 "provides sufficient guidance to the Attorney General").

Second, Congress clearly delineated "the public agency which is to apply" the authority by specifying the Attorney General as the executive official to whom it delegated authority under SORNA.

Third, Congress also clearly delineated the boundaries of the authority it delegated to the Attorney General. Section 16913(d) delegates to the Attorney General a single, narrow decision: to determine SORNA's application to preenactment sex offenders. Under this delegation, "the Attorney General cannot do much more than simply determine whether or not SORNA applies to those individuals." *United States v. Guzman*, 591 F.3d 83, 93 (2nd Cir. 2010). This circumscribed question is further "constrained by the legislative determinations that Congress made in other sections of SORNA," including the provisions pronouncing which crimes are subject to SORNA, § 16911, where the offender must register, § 16913(a), the timeframe within which the offender must register, § 16913(b), the method of registration, § 16913(b)–(c), and the information

the offender must include in the registry, § 16914(a). *United States v. Cooper*, 750 F.3d 263, 272 (3d Cir.), *cert. denied*, 135 S. Ct. 209 (2014). Congress also explicitly outlined the elements of the failure-to-register crime in § 2250. The authority Congress delegated under § 16913(d) is therefore bounded by the limited nature of the retroactive determination itself and the guidance Congress provided in other SORNA provisions.

Accordingly, we hold that § 16913(d) meets the Supreme Court's intelligible principles test because Congress clearly delineated SORNA's general policy, the public agency to which Congress delegated its authority, and the boundaries of this delegation. *See Mistretta*, 488 U.S. 372–73.

Mr. Nichols asserts, however, that we should apply the more rigorous "meaningfully constrains" standard instead of the "intelligible principle" standard because § 16913(d) delegates Congress's authority to regulate a statute with criminal consequences. In so arguing, Mr. Nichols relies on *Touby v. United States*, in which the Supreme Court acknowledged the possibility that "something more than an 'intelligible principle' is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions," but declined to resolve the issue because, even under a more stringent standard, the provision at issue in *Touby* "meaningfully constrains the Attorney General's discretion to define criminal conduct." 500 U.S. 160, 165–66 (1991). Mr. Nichols contends that this case is the appropriate vehicle to institute the more searching "meaningfully constrains" standard, and that § 16913(d) fails under that standard.

The Third Circuit recently confronted this issue in *Cooper*, 750 F.3d at 270–71. The *Cooper* court recognized the Supreme Court left open the question whether a heightened "meaningfully constrains" standard applies to Congress's delegation of authority involving statutes with criminal implications. *Id.* at 271. But as the Third Circuit further explained, the meaningful constraints standard "has been referenced in only a handful of cases, none of which set forth factors or a substantive analytical framework against which to assess whether a specific delegation satisfies the standard." *Id.* The Third Circuit therefore refused to invoke the meaningfully constrains standard "[u]ntil the Supreme Court gives us clear guidance to the contrary." *Id.*

We likewise decline to abandon the well-settled "intelligible principle" standard for the undeveloped "meaningfully constrains" standard. And because Congress provided an intelligible principle to which the Attorney General must conform in exercising the authority delegated under § 16913(d), we join our sister circuits[2] in concluding that § 16913(d) does not violate the nondelegation doctrine.[3]

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[2] *United States v. Cooper*, 750 F.3d 263, 271–72 (3d Cir.), *cert. denied*, 135 S. Ct. 209 (2014); *United States v. Richardson*, 754 F.3d 1143, 1146 (9th Cir. 2014); *United States v. Sampsell*, 541 F. App'x 258, 259–60 (4th Cir. 2013) (unpublished) (per curiam); *United States v. Goodwin*, 717 F.3d 511, 516–17 (7th Cir. 2013); *United States v. Kuehl*, 706 F.3d 917, 919–20 (8th Cir. 2013); *United States v. Parks*, 698 F.3d 1, 7–8 (1st Cir. 2012); *United States v. Felts*, 674 F.3d 599, 606 (6th Cir. 2012); *United States v. Guzman*, 591 F.3d 83, 92–93 (2nd Cir. 2010); *United States v. Whaley*, 577 F.3d 254, 263–64 (5th Cir. 2009); *United States v. Ambert*, 561 F.3d 1202, 1213 (11th Cir. 2009).

[3] We acknowledge the concern some federal judges have expressed with Congress's delegation of such an important question. *See Reynolds v. United States*, 132

Continued . . .

IV. CONCLUSION

For these reasons, we AFFIRM Mr. Nichols's conviction for failure to register in violation of 18 U.S.C. § 2250(a).

Cont.

S. Ct. 975, 986 (2012) (Scalia, J., dissenting) (opining that § 16913(d)'s delegation of authority to the Attorney General "sail[s] close to the wind with regard to the principle that legislative powers are nondelegable"); *United States v. Hinckley*, 550 F.3d 926, 948 (10th Cir. 2008) (Gorsuch, J., concurring) (applying principles of constitutional avoidance to prevent an interpretation that would allow the Attorney General to choose "willy nilly" between either of "two extremes" or anything in between in determining SORNA's application to preenactment offenders). Although we agree that Congress's delegation of this important decision is puzzling, *see Cooper*, 750 F.3d at 272, we conclude that it nonetheless passes constitutional muster.

14-3041, *United States v. Nichols*

McKAY, Circuit Judge, concurring.

I concur with the panel's opinion with regard to the nondelegation doctrine question. I also concur that, under these facts, our decision in *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011), binds us with regard to the application of SORNA, and compels this court to determine that Kansas remained a "jurisdiction involved" under the Act even after Mr. Nichols abandoned his residence there. I write separately to express disagreement with the majority in *Murphy*, agreement with the dissent in *Murphy* by Judge Lucero, and my belief that consideration of this case by the full en banc court would be appropriate.

Judge Lucero's interpretation of SORNA's registration requirements accords with that of the Eighth Circuit in *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013). *Lunsford* held that an individual who abandons a residence in a jurisdiction covered by SORNA to move to a jurisdiction not covered by SORNA no longer resides in a "jurisdiction involved" under the Act and therefore has no obligation to register. *Id.* at 861. I am persuaded by this reading of SORNA's plain language, however, the majority opinion in *Murphy* currently controls this case, and I accordingly concur.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

United States of America,

Plaintiff,

vs. Case No. 13-10106-JTM

Lester Ray Nichols,

Defendant.

MEMORANDUM AND ORDER

The defendant, Lester Ray Nichols, is charged with knowingly failing to register and update his registration as required by the Sex Offender Registration and Notification Act (SORNA) in violation of 18 U.S.C. § 2250(a). The matter is before the court on Nichols's motion to dismiss the charge, arguing that SORNA does not apply to him under the circumstances of his case.

In 2003, Nichols was convicted of interstate travel to engage in sex with a minor, in violation of 18 U.S.C. § 2423(b). *United States v. Nichols*, No. 03-10127-MLB (D. Kan. Dec. 17, 2003). He was sentenced to 120 months imprisonment.

Nichols was released from prison and under federal supervision in the District of Kansas in 2012. Up until that time, he had complied with both Kansas and federal authorities in keeping his sex offender registry up to date every three months. He last

registered in early October, 2012, and he was to renew his registration in early January, 2013.

However, in early November, 2012, Nichols boarded a plane from Kansas City International Airport to Manila, Philippines. On November 16, a warrant was issued to arrest Nichols for violation of his supervised release.

On December 26, 2012, law enforcement officers of the Manila Police and Philippine Bureau of Immigration arrested Nichols at a Manila hotel. After he was identified, Nichols met with an agent of the United States Department of State, Diplomatic Security Service (DSS). Nichols was held in custody and deported by plane to Los Angeles, California, where he was taken into custody by the United States Marshal Service and transported to Kansas to face the present charge.

Nichols contends that SORNA did not require him to register as a sex offender while he was in the Philippines. 42 U.S.C. § 16913(a) requires:

> A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

SORNA explicitly defines "jurisdiction" as:

> (A) A State.
> (B) The District of Columbia.
> (C) The Commonwealth of Puerto Rico.
> (D) Guam.
> (E) American Samoa.
> (F) The Northern Mariana Islands.
> (G) The United States Virgin Islands.
> (H) To the extent provided and subject to the requirements of section 16927

of this title, a federally recognized Indian tribe.

42 U.S.C. § 16911(10). Further, SORNA provides that "[t]he term 'resides' means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives." 42 U.S.C. § 16911(13).

Finally, 42 U.S.C. § 16928 provides:

> The Attorney General, in consultation with the Secretary of State and the Secretary of Homeland Security, shall establish and maintain a system for informing the relevant jurisdictions about persons entering the United States who are required to register under this subchapter. The Secretary of State and the Secretary of Homeland Security shall provide such information and carry out such functions as the Attorney General may direct in the operation of the system.

The defendant agues that he does not fall under SORNA because he resided in the Philippines, a foreign country. In advancing this argument, the defendant acknowledges *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011). In *Murphy*, the court held the defendant violated SORNA when he moved form his residence in Utah to Belize. It observed that

> although SORNA gives a sex offender the ability to satisfy his registration requirement in one state by updating his registration in another state, he cannot do so by registering in a foreign country, because it is not a SORNA jurisdiction. Thus, a sex offender relocating abroad must satisfy his reporting obligations in a jurisdiction involved.
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> In sum, it is plain that the definitions in § 16911 and the registration obligation in § 16913 require a sex offender, upon changing his residence, to update his registration in a jurisdiction involved—in this case, where the offender has a home or habitually lives or works—even if he did not establish a new residence in a SORNA jurisdiction. To put it more directly, when a sex offender changes residences, jobs, or student status, a reporting obligation arises in a state where he lives, works, or is in school.

664 F.3d at 803. According to the court, the SORNA requirement that the defendant update his registration "attached when he left Bonneville, while he was still in Utah, and not when he arrived in Belize." *Id.* at 804.

Here, Nichols advances several rationales as to why *Murphy* was mistaken, including the verb tense used for "resides" under 42 U.S.C. § 16911(13), and that the intent of Congress to limit the extraterritorial effect of SORNA is reflected in 42 U.S.C. § 16928. He also notes that similar arguments have succeeded in persuading the Eighth Circuit to reach a conclusion contrary to *Murphy* in *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013).

Murphy, however, remains controlling authority, and establishes that Nichols violated SORNA when he did not update his registration in Kansas prior to departing for Manilla. Under SORNA, "[t]he permanent abandonment of an abode constitutes a change of residence, regardless of whether a new residence has been formally adopted." *Murphy*, 664 F.3d at 802-03. While Nichols could not make a new registration in the Philippines, SORNA permitted and required notice of the change in State of Kansas. "[T]his statutory construction aligns with legislative intent, because Congress's goal in enacting SORNA was to ensure that sex offenders could not avoid registration requirements by moving out of state." *Id.*

Alternatively, Nichols argues that 42 U.S.C. § 16913(d) is unconstitutional, as the statute improperly delegates legislative power to the Attorney General to determine whether SORNA should be applied retroactively to pre-Act offenders. Again, Nichols

acknowledges that there is a recent Tenth Circuit case reaching a contrary conclusion, *United States v. Rickett*, ___ Fed. Appx. ___, 2013 WL 4750781 (10th Cir. 2013). He correctly notes that in *Rickett*, the court did not directly address the issue of whether application of SORNA to pre-Act offenders violates the non-delegation principle. In *Rickett*, the defendant had pled guilty to the offense, so the Tenth Circuit only decided that the application of SORNA was not plain error.

Plain error is "(1) error that is (2) plain, (3) affects substantial rights, and (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. DeChristopher*, 695 F.3d 1082, 1091 (10th Cir.2012). In *Rickett*, the court held that the defendant's SORNA challenge failed at the second stage; since the "purported constitutional infirmity under the nondelegation doctrine is anything but plain (i.e., clear or obvious), we ... need not reach prongs one, three, or four." 2013 WL 4750781, at *5. The court held that the defendant could not establish plain error, because under this standard "to render an alleged error 'clear' or 'obvious,' Mr. Rickett needs *controlling* Supreme Court or Tenth Circuit precedent, or a hefty weight of *controlling* authority from other circuits. *Id.* at *7 (emphasis in *Rickett*). Since the defendant could cite to only a few "concurring and dissenting opinions of several jurists who have noted a potential delegation problem with § 16913(d)'s grant of authority to the Attorney General," he did not meet this standard. *Id.*

However, while *Rickett* is not controlling here given its plain error analysis, the rest of the opinion places his argument strongly in doubt. First, the Tenth Circuit reviewed the history of the nondelegation doctrine, ultimately concluding that the doctrine was virtually

dead:

> To facilitate our analysis of whether any error here is "clear" or "obvious" we begin with a brief discussion of the origin and evolution of the nondelegation doctrine. "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). The doctrine derives from the Constitution's opening declaration that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. Fidelity to the constitutional text and to the structure of government that the Constitution sets up "mandate[s] that Congress generally cannot delegate its legislative power to another Branch." *Mistretta*, 488 U.S. at 372. Congress may, however, vest "decisionmaking authority" in a coordinate branch so long as it provides "an intelligible principle to which the person or body authorized to [act] is directed to conform." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) (alteration in original) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928)) (internal quotation marks omitted).
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> Between 1789 and 1935 – a period spanning 146 years of constitutional history – the Supreme Court "never struck down a challenged statute on delegation grounds." *Mistretta*, 488 U.S. at 373. Then, in 1935, the Court invalidated two statutes as unconstitutional delegations of legislative power. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542, 55 S.Ct. 837, 79 L.Ed. 1570 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430, 55 S.Ct. 241, 79 L.Ed. 446 (1935); *see also* 1 Ronald D. Rotunda & John E. Nowak, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 4.8(b), at 649 n. 17 (5th ed. 2012) ("The only time the Court clearly invalidated a statute for being an excessive delegation of legislative authority was 1935.").
>
> The doctrine went dormant thereafter, and the Supreme Court has since upheld, "without deviation, Congress' ability to delegate power under broad standards." *Mistretta*, 488 U.S. at 373; *see Whitman*, 531 U.S. at 474. Indeed, so dormant is the nondelegation doctrine that some have deemed it a "dead letter." *See* Gary Lawson, Delegation and Original Meaning, 88 VA. L.REV. 327, 329 (2002). Still, the Supreme Court has never expressly overruled *Schechter Poultry* or *Panama Refining*; so the doctrine, even if dead, has never received a proper burial.

2013 WL 4750781, at *5-6.

Second, while some dissenting and concurring opinions have suggested a nondelegation doctrine challenge to the application of SORNA to pre-Act offenders, the court stressed that the decisions squarely considering the issue are "abundant," and that the "clear weight of appellate authority" rejects the argument. *Id.* at *7.

> [W]e note that neither the Supreme Court nor our court has ever addressed whether § 16913(d) is an unconstitutional delegation to the Attorney General.... Moreover, those circuits that have considered similar nondelegation challenges to SORNA have uniformly rejected them. *See, e.g., United States v. Kuehl*, 706 F.3d 917, 920 (8th Cir.2013); *United States v. Parks*, 698 F.3d 1, 7–8 (1st Cir.2012), cert. denied, --- U.S. ----, 133 S.Ct. 2021, 185 L.Ed.2d 889 (2013); *United States v. Felts*, 674 F.3d 599, 606 (6th Cir.2012); *United States v. Guzman*, 591 F.3d 83, 91–93 (2d Cir.2010); *United States v. Whaley*, 577 F.3d 254, 263–64 (5th Cir.2009); *United States v. Ambert*, 561 F.3d 1202, 1212–15 (11th Cir.2009); *see also Kuehl*, 706 F.3d at 920 ("We agree with our sister Circuits that section 16913(d) of SORNA is a valid delegation of authority because Congress provided the Attorney General with an intelligible principle to follow." (footnote omitted) (collecting cases)); *Parks*, 698 F.3d at 8 ("All other circuits that have addressed the issue [as to SORNA] have rejected the delegation objection, which modern case law tends regularly to disfavor."); *cf. United States v. Dixon*, 551 F.3d 578, 583–84 (7th Cir.2008) ("Likewise without merit is his argument that for Congress to delegate to an official of the executive branch the authority to fill out the contours of a statute violates the separation of powers. It is commonplace and constitutional for Congress to delegate to executive agencies the fleshing out of criminal statutes by means of regulations."), *rev'd on other grounds sub nom., Carr v. United States*, 560 U.S. 438, 130 S.Ct. 2229, 176 L.Ed.2d 1152 (2010).

Id. (footnotes omitted).

Third, the Tenth Circuit in a separate case has observed that "§ 16913—SORNA's registration provision—does not violate the ... nondelegation doctrine...." *United States v. Carel*, 668 F.3d 1211, 1214 (10th Cir. 2011).

As the court expressly noted in *Rickett*, this language in *Carel* was dicta and thus not

controlling. But while *Rickett* may not be as *automatically* fatal to the defendant's second argument as *Murphy* was to his first, it points to the same result. That is, *Rickett* recognized that (1) the nondelegation doctrine is dead if not buried, (2) that "abundant authority" from other circuits "upholds SORNA in the face of nondelegation challenges," and (3) a prior panel of the Tenth Circuit rejected the argument, albeit in dicta.

Finally, it must be noted that the defendant provides small grounds for supporting his request that the court depart from the"abundant authority" and strike down the application of SORNA based upon a "dead letter" doctrine. Rather, the most the defendant does is to stress that *Rickett* is not technically controlling (Dkt. at 6-7), along with a citation to Justice Scalia's observation in dissent in *Reynolds v. United States*, 132 S.Ct. 975, 986 (2012) (Scalia, J.) (dissenting) that a construction of SORNA which would grant the Attorney General discretion to apply the statute to pre-Act offenders "seems to me sailing close to the wind with regard to the principle that legislative powers are nondelegable."[1] Other than this single statement made in dissent, the defendant offers no authority for his second argument, and the court finds SORNA is constitutional.

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[1] In *Reynolds*, the defendant was a pre-Act offender who challenged the application of SORNA before the Attorney General had effectively implemented any regulations pursuant to 42 U.S.C. § 16928. The Court held that "the Act's registration requirements do not apply to pre-Act offenders *until the Attorney General so specifies*." 132 S.Ct. at 984 (emphasis added). This would be yet another indication that application of SORNA to pre-Act offenders, based on the broad grant of authority under § 16928, is lawful.

IT IS ACCORDINGLY ORDERED this 10th day of November, 2013, that the defendant's Motion to Dismiss (Dkt. 13) is hereby denied.

s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE

FILED
United States Court of Appeals
Tenth Circuit

April 15, 2015

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LESTER RAY NICHOLS,

Defendant - Appellant.

No. 14-3041

ORDER

Before **BRISCOE**, Chief Judge, **KELLY, LUCERO, HARTZ, TYMKOVICH, GORSUCH, HOLMES, MATHESON, BACHARACH, PHILLIPS, MCHUGH**, and **MORITZ**, Circuit Judges.

This matter is before the court on the appellant's *Petition for Rehearing En Banc*. We also have a response from the government. Upon consideration of the implicit request for panel rehearing contained in the petition, the request is denied by a majority of the original panel members.

The en banc petition was also transmitted to all of the judges of the court who are in regular active service. Upon review, a poll was called, and a majority of the active judges voted to deny the en banc suggestion. Consequently, that request is likewise denied. Judges Lucero, Gorsuch, Matheson and Moritz would grant the en banc petition.

Judges Lucero and Gorsuch have written separately in dissent from the denial of the petition.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

14-3041, United States v. Nichols (Lucero, J., dissenting from the denial of rehearing en banc)

I dissent from the denial of rehearing en banc because a recent Eighth Circuit decision creates a circuit split regarding the applicability of SORNA's notice provisions to offenders who leave the country. Compare United States v. Lunsford, 725 F.3d 859, 860 (8th Cir. 2013), with United States v. Murphy, 664 F.3d 798, 799 (10th Cir. 2011). I continue to hold the view that Murphy was incorrectly decided for the reasons stated in my dissent from that case. See id. at 804-08 (Lucero, J., dissenting). Correcting this circuit split is a matter of exceptional importance given the express purpose of Congress in enacting SORNA to remedy "a wide disparity among State registration requirements and notification obligations for sex offenders." H.R. Rep. No. 109-218(I), at 23 (2005).

The facts of Lunsford and this case illustrate why our current jurisprudence runs directly against the stated intent of Congress. In both cases, the appellants moved directly from the Kansas City metropolitan area to the Philippines. Lunsford had lived in the Missouri side of the metropolis and was not required to update his Missouri registration to reflect his move out of the country. Lunsford, 725 F.3d at 860. But Nichols, who had lived just across the river in Kansas, was brought back to the United States and sentenced to prison for failing to update his Kansas registration. United States v. Nichols, 775 F.3d 1225, 1227 (10th Cir. 2014). We have simply replaced a "wide disparity among State registration requirements" with a wide disparity among Circuit registration requirements. In doing so, we thwart the intent of Congress and needlessly complicate an already complicated law.

Additionally, I agree with Judge Gorsuch that the Constitution demands something more than an "intelligible principle" when Congress delegates its power to define crimes to the executive branch agency charged with prosecuting those crimes. Moreover, I agree that it is questionable whether SORNA even includes an "intelligible principle" to guide the Attorney General's discretion to apply SORNA's provisions to pre-Act offenders. I would address this issue in en banc rehearing as well.

No. 14-3041, *United States v. Nichols*

GORSUCH, Circuit Judge, dissenting from the denial of rehearing en banc.

A circuit split lingers here. First to approach the question, this circuit interpreted 42 U.S.C. § 16913 as requiring sex offenders to notify authorities if they plan to leave the country. *United States v. Murphy*, 664 F.3d 798, 801-02 (10th Cir. 2011). In a later opinion the Eighth Circuit gave thoughtful consideration to this interpretation of the statute but came to the opposite view. *United States v. Lunsford*, 725 F.3d 859, 861-82 (8th Cir. 2013); *see also Murphy*, 664 F.3d at 805 (Lucero, J., dissenting). In denying rehearing today to reconsider this court's position in light of *Lunsford*'s learning, we leave those who seek a resolution of the circuit split to travel other avenues. *Murphy* and *Lunsford* articulate both sides of the split admirably and there's no need for further amplification here, only resolution somewhere.

Beyond this matter of statutory interpretation, though, lies a constitutional question that deserves more notice. If the separation of powers means anything, it must mean that the prosecutor isn't allowed to define the crimes he gets to enforce. Yet, that's precisely the arrangement the Sex Offender Registration and Notification Act purports to allow in this case and a great many more like it. In § 16913(d), Congress left it to the Attorney General to decide whether and on what terms sex offenders convicted before the date of SORNA's enactment should be required to register their location or face another criminal conviction. So unusual is this delegation of legislative authority that to find an analogue you

might have to look back to the time Congress asked the President to devise a code of "fair competition" for the poultry business — a delegation of legislative authority the Supreme Court unanimously rejected and Justice Cardozo called "unconfined and vagrant," a "delegation running riot." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551, 553 (1935) (Cardozo, J., concurring). Even then you could be excused for thinking the delegation before us a good deal less cooped or caged than that one. After all, it doesn't just grant some alphabet soup agency the power to write rules about the chicken trade. It invests in the nation's chief prosecutor the authority to devise a criminal code governing a half-million people.

When it comes to sex offenders convicted *after* SORNA's enactment, the statute is exquisitely detailed. It divides those persons into three tiers based on the seriousness of their offense. 42 U.S.C. § 16911. It specifies which sex offenses place offenders in which tiers. *Id.* It requires tier I offenders to register their location for 15 years; tier II offenders to do so for 25 years; and tier III offenders to carry on registering for life. *Id.* § 16915. It explains what conditions merit reducing the registration period. *Id.* § 16915(b)(1). On and on it goes for 22 pages.

But none of this automatically applies to Mr. Lester Nichols and others convicted of sex offenses *before* the Act's passage. Instead, when it comes to past offenders, the Act says just this:

> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for registration of any such sex offender. 42 U.S.C. § 16913(d).

Yes, that's it.

As the government acknowledges, this language leaves the Attorney General free to do nothing: the law "does not require the Attorney General to act within a certain time frame or by a date certain; it does not require him to act at all." Brief for the United States at 23-24, *Reynolds v. United States*, 132 S. Ct. 975 (2012) (No. 10-6549). Alternatively, "[u]nder his delegated authority in Subsection (d), the Attorney General could" require all past offenders to register or "require some but not all to register." *Id.* at 24-25. Or, alternatively still, he could require those forced to register to "comply with some but not all of the registration requirements" applicable to future offenders in order to adapt the law as he thinks best for past offenders. *Id.* After all, the statute grants the Attorney General authority to specify the applicability not of the Act as a whole, one way or another, but to specify the applicability of each of the various "requirements" contained within the Act — and Congress well knew the difference. *Compare* 42 U.S.C. § 16912(b) (explaining that the Attorney General shall "interpret and implement this subchapter"), *with id.* § 16913(d) (providing the Attorney General authority "to specify the applicability of the requirements of this subchapter"). Even then, the Attorney General remains free to "change his mind at any given

time or over the course of different administrations." Brief for the United States, *supra*, at 23-24. Given all this, it's perhaps unsurprising how many circuits and commentators have observed that the degree of discretion invested in the Attorney General here is vast.[1] It is so vast, in fact, that some (including the government itself) once suggested a narrower interpretation of § 16913(d) would make more sense of the statute. *See id.*; *Reynolds*, 132 S. Ct. at 986 (Scalia, J., dissenting).

A majority of the Supreme Court, however, carefully considered and rejected any alternative reading and made plain that, as a matter of statutory interpretation, SORNA's retroactive application hinges on the Attorney General. The Court explained that Congress chose this course as its solution for the many "problems" associated with trying "to apply [SORNA's] registration requirements to pre-Act offenders" who were at the time subject to a "patchwork of pre-existing state systems." *Reynolds*, 132 S. Ct. at 981. The power delegated to the

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[1] *See, e.g.*, *United States v. Rickett*, 535 F. App'x 668, 673 (10th Cir. 2013) ("As written, § 16913(d) gives the Attorney General discretion to decide whether and how SORNA should be applied retroactively."); *United States v. DeJarnette*, 741 F.3d 971, 981 (9th Cir. 2013) ("[W]e see no reason to assume that the Attorney General was mandated to apply *all* of SORNA's registration requirements to *all* pre-Act offenders."); *United States v. Johnson*, 632 F.3d 912, 923 (5th Cir. 2011) ("This language is not ambiguous. Following the plain meaning rule, this phrase delegates to the Attorney General the decision of whether and how the SORNA registration requirements apply to offenders with pre-enactment convictions."); *United States v. Madera*, 528 F.3d 852, 858 (11th Cir. 2008) ("Subsection (d) . . . granted the Attorney General unfettered discretion to determine both *how* and *whether* SORNA was to be retroactively applied."); *see also* Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 Notre Dame L. Rev. 483, 485 (2014); Reem Sadik, Comment, *Passing the Torch but Sailing too Close to the Wind*, 6 Legis. & Pol'y Brief 295, 298 (2014).

Attorney General, the Court said, is sort of like a directive telling the Commissioner of Major League Baseball that he has "the authority to specify the applicability" of a stringent minor league drug testing policy to major league players: "we should think that the minor league policy would not apply unless and until the Commissioner so specified" whether and how it should be applied to meet the needs of a similar but different league. *Id.* As written, the statute demonstrates Congress thought that past offenders could "warrant[] different federal registration treatment" than future offenders. *Id.* Even among pre-Act offenders, the statute contemplates the possibility of "different federal registration treatment of different categories of pre-Act offenders." *Id.* In short, Congress thought it a "desirable solution" to ask "the Department of Justice . . . to examine these pre-Act offender problems" and specify "new registration requirements" for them. *Id.*

The Court acknowledged that a statute investing so much authority in the Attorney General inevitably raises with it separation of powers questions. But, the Court said, it would leave those questions for another day. *Id.* Justices Scalia and Ginsburg went further, expressing concern that the law "sail[s] close to the wind." *Id.* at 986 (Scalia, J., dissenting). The day to decide the constitutional question the Court left open is now upon us. And, as it turns out, the statute doesn't just sail close to the wind. It sails right into it.

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Article I § 1 provides that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. Many times over and in cases stretching back to the founding the Supreme Court has held that this language limits the ability of Congress to delegate its legislative power to the Executive. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001). There's ample evidence, too, that the framers of the Constitution thought the compartmentalization of legislative power not just a tool of good government or necessary to protect the authority of Congress from encroachment by the Executive but essential to the preservation of the people's liberty. As Madison put it, "[n]o political truth is . . . stamped with the authority of more enlightened patrons of liberty" than the separation of powers because "[t]he accumulation of all powers, legislative, executive, and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 298 (James Madison) (Clinton Rossiter ed., 1961). By separating the lawmaking and law enforcement functions, the framers sought to thwart the ability of an individual or group to exercise arbitrary or absolute power. And by restricting lawmaking to one branch and forcing any legislation to endure bicameralism and presentment, the framers sought to make the task of lawmaking more arduous still. These structural impediments to lawmaking were no bugs in the system but the point of the design: a deliberate and jealous effort to preserve room for

individual liberty. *See, e.g.*, *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring) ("The principle that Congress cannot delegate away its vested power exists to protect liberty.").

Without a doubt, the framers' concerns about the delegation of legislative power had a great deal to do with the criminal law. The framers worried that placing the power to legislate, prosecute, and jail in the hands of the Executive would invite the sort of tyranny they experienced at the hands of a whimsical king. Their endorsement of the separation of powers was predicated on the view that "[t]he inefficiency associated with [it] serves a valuable" liberty-preserving "function, and, in the context of criminal law, no other mechanism provides a substitute." Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1011-17, 1031 (2006).

So it is that "to abandon openly the nondelegation doctrine [would be] to abandon openly a substantial portion of the foundation of American representative government." Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 332 (2002). Neither is it so much that bureaucrats might do a "bad job as our effective legislators" as that "they are neither elected nor reelected, and are controlled only spasmodically by officials who are." John Hart Ely, *Democracy and Distrust* 131 (1980).[2]

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[2] For other excellent works along these and related lines, see Philip Hamburger, *Is Administrative Law Unlawful?* 377 (2014); Bogdan Iancu, *Legislative Delegation: The Erosion of Normative Limits in Modern*

Of course all this invites the question: how do you know an impermissible delegation of legislative authority when you see it? By its own telling, the Court has had a hard time devising a satisfying answer. *See, e.g.*, *Wayman v. Southard*, 23 U.S. (10 Wheat) 1, 42 (1825) ("[T]he precise boundary of this power is a subject of delicate and difficult inquiry. . . ."). But the difficulty of the inquiry doesn't mean it isn't worth the effort. After all, at stake here isn't just the balance of power between the political branches who might be assumed capable of fighting it out among themselves. At stake is the principle that the scope of individual liberty may be reduced only according to the deliberately difficult processes prescribed by the Constitution, a principle that may not be fully vindicated without the intervention of the courts. And "[a]bdication of responsibility is not part of the constitutional design." *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).[3]

Constitutionalism 222 (2012); Martin Redish, *The Constitution as Political Structure* 16 (1995); David Schoenbrod, *Power Without Responsibility* 181 (1993); Ernest Gellhorn, *Returning to First Principles*, 36 Am. U. L. Rev. 345, 352 (1987); Paul Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, 40 Law & Contemp. Probs. 46, 49-65 (1976); Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 Cardozo L. Rev. 807, 822 (1999); Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 Colum. L. Rev. 1119, 1127-30 (1977); Bernard Schwartz, *Of Administrators and Philosopher-Kings: The Republic, The Laws, and Delegations of Power*, 72 Nw. U. L. Rev. 443, 457 (1978); Nadine Strossen, *Delegation as a Threat to Liberty*, 20 Cardozo L. Rev. 861, 861 (1999).

[3] *See also, e.g.*, *Ass'n of Am. Railroads*, 135 S. Ct. at 1237 (Alito, J., concurring) ("[T]he inherent difficulty of line-drawing is no excuse for not enforcing the Constitution."); *id.* at 1246 (Thomas, J., concurring in the

Besides, putting the pieces together it turns out we do know a few things.

We know, for example, that Congress can leave "details" to the Executive. Congress can't punt to the President the job of devising a competition code for the chicken industry. *Schechter Poultry*, 295 U.S. at 531. Such widely applicable rules governing private conduct must be enacted by the Legislature. But once Congress enacts a detailed statutory scheme on its own — once it says, for example, that margarine manufacturers must pay a tax and place a stamp on their packages showing the tax has been paid — Congress may leave to the President "details" like designing an appropriate tax stamp. *In re Kollock*, 165 U.S. 526, 533 (1897); *see also, e.g.*, *Currin v. Wallace*, 306 U.S. 1, 15 (1939); *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932).

Of course, defining what qualifies as a detail is itself no detail. But whether or not something fairly denominated a detail is involved, we also know Congress may pass legislation the operation of which is conditioned on a factual finding by the President. So, for example, Congress may direct the President to lift a statutorily imposed trade embargo against Great Britain if he determines as a

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judgment) (explaining that enforcing the separation of powers "is no less important for its difficulty"); Louis L. Jaffe, *An Essay on Delegation of Legislative Power*, 47 Colum. L. Rev. 561, 577 (1947) ("[N]early every doctrine of constitutional limitation has been attacked as vague. Essentially the charges go to the institution of judicial review as we have it rather than specifically to the delegation doctrine."); Antonin Scalia, *A Note on the Benzene Case*, Reg., July-Aug. 1980, at 25, 28 ("So even with all its Frankenstein-like warts, knobs, and (concededly) dangers, the unconstitutional delegation doctrine is worth hewing from the ice.").

factual matter that it is no longer violating the United States's neutrality. *See Cargo of the Brig Aurora v. United States*, 11 U.S. 382, 388 (1813); *see also, e.g., Marshall Field & Co. v. Clark*, 143 U.S. 649, 692-93 (1892). That's clearly no trivial question the President may answer. But answer it he may so long as a clear legislative consequence follows from his factual finding.

While these are the most traditional delegation tests — is it a detail? do we have a clear legislative consequence hinging on a factual finding? — in more recent times the Court has gone further, allowing legislation to stand so long as it contains an "intelligible principle" to guide the exercise of Executive discretion. *J.W Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). How intelligible the "intelligible principle" must be to pass muster is much debated.[4] But we know, by way of example, that Congress may ask the EPA to set national air quality standards which are "requisite to protect the public health" subject to "an adequate margin of safety" because, as used in the statute, the term "requisite" demands a standard neither higher nor lower than necessary to meet

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[4] *See, e.g., Ass'n of Am. Railroads*, 135 S. Ct. at 1246 (Thomas, J., concurring in the judgment); *Mistretta v. United States*, 488 U.S. 361, 415-17 (1989) (Scalia, J., dissenting); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223, 1224 (1985) ("Since the early part of this century, the Court has said in essence that a statute may be vague so long as it is either not too vague or no vaguer than necessary."); Lawson, *supra*, at 329 (asserting that the Court has "found intelligible principles where less discerning readers find gibberish"); *see also supra* n.2 (additional authorities discussing this question).

the legislatively directed objective of protecting the public health with an adequate margin of safety. *Whitman*, 531 U.S. at 473, 476.

Still, the Court has never expressly held that an intelligible principle alone suffices to save a putative delegation when the criminal law is involved. *See Touby*, 500 U.S. at 165-66. To be sure, the Court has applied the intelligible principle test to regulations that may be enforceable through criminal penalties. *See, e.g.*, *United States v. O'Hagan*, 521 U.S. 642, 695 n.10 (1997); *Yakus v. United States*, 321 U.S. 421, 424-25 (1944). But the Court hasn't endorsed the test in anything like the situation we face — legislation leaving it to the nation's top prosecutor to specify whether and how a federal criminal law should be applied to a class of a half-million individuals. In fact, the Court has repeatedly and long suggested that in the criminal context Congress must provide more "meaningful[]" guidance than an "intelligible principle." *Touby*, 500 U.S. at 166; *Fahey v. Mallonee*, 332 U.S. 245, 249-50 (1947); *see also, e.g.*, *United States v. Robel*, 389 U.S. 258, 272-73 (1967) (Brennan, J., concurring); *Barenblatt v. United States*, 360 U.S. 109, 140 n.7 (1959) (Black, J., dissenting); *cf. United States v. Grimaud*, 220 U.S. 506, 517 (1911); *United States v. Eaton*, 144 U.S. 677, 687-88 (1892).

It's easy enough to see why a stricter rule would apply in the criminal arena. The criminal conviction and sentence represent the ultimate intrusions on personal liberty and carry with them the stigma of the community's collective

condemnation — something quite different than holding someone liable for a money judgment because he turns out to be the lowest cost avoider. *See, e.g.*, Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 Law & Contemp. Prob. 401, 404 (1958); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. Contemp. Legal Issues 1, 26 (1996). Indeed, the law routinely demands clearer legislative direction in the criminal context than it does in the civil and it would hardly be odd to think it might do the same here. *See, e.g.*, *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., statement respecting the denial of certiorari). When it comes to legislative delegations we've seen, too, that the framers' attention to the separation of powers was driven by a particular concern about individual liberty and even more especially by a fear of endowing one set of hands with the power to create and enforce criminal sanctions. And might not that concern take on special prominence today, in an age when federal law contains so many crimes — and so many created by executive regulation — that scholars no longer try to keep count and actually debate their number? *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991) (estimating that over 300,000 federal criminal regulations are on the books).

Recently, the Supreme Court has suggested what a more "meaningful" standard might look like in the criminal context. *See Touby*, 500 U.S. at 166-67.

Its discussion came in the course of a challenge to the Controlled Substances Act — legislation permitting the Attorney General to schedule various drugs as controlled substances, rendering their possession by unauthorized persons illegal. The Court allowed the law to stand, but instead of applying the intelligible principle test alone it proceeded to stress the presence and importance of certain specific statutory features. First, the Court explained, to schedule a drug as a controlled substance the Executive had to find that the drug posed an "imminent hazard" to public safety. *Id.* at 166. Second, when making that determination, the Court noted, the Executive had to consider the drug's "history and current pattern of abuse," "[t]he scope, duration, and significance of abuse," and "[w]hat, if any, risk there is to the public health." *Id.* Third, the law required a further factual finding that the drug in question "has a high potential for abuse," "has no currently accepted medical use in treatment in the United States," and "[t]here is a lack of accepted safety for use of the drug . . . under medical supervision." *Id.* at 167.

Here we see strains of a more traditional delegation jurisprudence, one permitting Congress to enact rules the operation of which is premised on the Executive's factual findings. Indeed, distilling *Touby* to its essence, at least three "meaningful" limitations emerge: (1) Congress must set forth a clear and generally applicable rule (unauthorized persons may not possess the drug) that (2) hinges on a factual determination by the Executive (does the drug pose an

imminent hazard?) and (3) the statute provides criteria the Executive must employ when making its finding (does the drug in question currently have an accepted medical use?). These three criteria could easily be applied to most any delegation challenge in the criminal context and provide the more meaningful standard the Court has long sought. In fact, since *Touby* a number of courts of appeals have employed something very much like them when assessing delegation challenges to federal criminal statutes. *See United States v. Amirnazmi*, 645 F.3d 564, 576-77 (3d Cir. 2011); *United States v. Dhafir*, 461 F.3d 211, 216-17 (2d Cir. 2006); *United States v. Arch Trading Co.*, 987 F.2d 1087, 1093-94 (4th Cir. 1993).

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With that much guidance about delegation doctrine in hand, a few things come clear when we return to the statute before us. For one, it's easy enough to see the similarities between our case and *Schechter Poultry* where the Court held Article I violated. Here as there Congress pointed to a problem that needed fixing and more or less told the Executive to go forth and figure it out. Meanwhile, it's hard to see how ours might be likened to any of the cases turning away delegation challenges.

True, some might try to pass off the question of SORNA's applicability to past offenders as a mere "detail." But the statute before us leaves the Attorney General with "unfettered discretion to determine both *how* and *whether* SORNA [is] to be retroactively applied" to a half-million individuals under threat of

criminal prosecution from his own deputies. *Madera*, 528 F.3d at 858. And however far you want to bend the boundaries of what qualifies as a "detail" it's hard to see how that might qualify. Our case just isn't anything like your grandfather's tax stamp challenge.

Fair enough, some might respond, but sex offenders are so unpopular that there's little chance an Attorney General would do anything other than apply SORNA retroactively to the fullest extent possible. Maybe there is no legislative mandate — conditional or otherwise — requiring him to follow this course, but there might as well be. A reply along these lines seems a likely enough answer to the question what a politically attuned Attorney General would do when the hot potato is passed his way. But it also seems an unlikely answer to the question whether Congress may constitutionally pass the potato in the first place. After all, in a delegation challenge the question isn't whether the Executive is likely to exercise the delegation in one way or another but whether Congress is empowered to delegate the decision at all. *See Whitman*, 531 U.S. at 472-73 ("The very choice of which portion of the power to exercise . . . would *itself* be an exercise of the forbidden legislative authority."). Indeed, the logic at play here would serve to ensconce even the most extreme and obviously unconstitutional delegations only because of a judicial intuition about contemporary political pressures. And not only do unelected judges make for notoriously poor political

pundits: ours is supposed to be an independent judiciary making decisions on the legal merits without respect to the vagaries of shifting political winds.

Others still might claim an "intelligible principle" can be rummaged out of SORNA's preamble — a provision that expresses Congress's wish to "protect the public from sex offenders and offenders against children" by establishing "a comprehensive national system for the registration of those offenders." 42 U.S.C. § 16901. But Supreme Court cases rejecting delegation challenges on intelligible principle grounds don't usually rest on policy objectives voiced in a statute's preamble. *See, e.g.*, *Panama Refining Co. v. Ryan*, 293 U.S. 388, 417-19 (1935) (finding a statute's general policy statement insufficient because the "general outline of policy contains nothing as to the circumstances or conditions in which" the delegation should be exercised, *id.* at 417). To be sure, the Court has sometimes gone so far as to suggest that Congress need only "clearly delineate[] the general policy" to guide an agency's conduct. *Mistretta*, 488 U.S. at 372-73. But this language usually seems to cover situations in which the legislative grant of discretion is tied to specific statutory provisions that expressly direct the exercise of that discretion. *See, e.g.*, *id.* at 375-76 (containing a direct link between discretion and direction); *Yakus*, 321 U.S. at 420-21 (same). Even in *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), perhaps one of the most ambitious uses of the intelligible principle test, the Court interpreted the statute granting the Executive discretion to regulate radio in the "public interest"

as requiring him to exercise that discretion in ways that "encourage the larger and more effective use of radio." *Id.* at 216. Meanwhile, no comparable guidance exists here for § 16913(d) "specifie[s] no governing standard whatsoever." Calabresi & Lawson, *supra* n.1, at 485.

Requiring a direct statutory link between discretion and direction makes sense too. After all, as the Court has acknowledged in recent years, it is most assuredly wrong to assume that "whatever" seems to further a "statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (emphasis omitted). Legislation is the art of compromise and few (if any) statutes pursue a single preambulatory purpose without condition, subtlety, or exception. *Id.* at 525-26; *see also United States v. Rentz*, 777 F.3d 1105, 1113 (10th Cir. 2015) (en banc); John F. Manning, *What Divides Textualists from Purposivists?*, 106 Colum. L. Rev. 70, 104 (2006). For precisely these reasons, when it comes to the business of statutory interpretation it is usually the more specific and not the more general or aspirational direction that controls. *See, e.g.*, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976).

Our case illustrates the point. SORNA's prefatory provision expressing the desire to protect children and create a nationwide registration requirement hardly establishes that the statute meant to do so always and in every particular without exception or at any cost. In fact, SORNA is replete with examples of compromise even when it comes to future offenders. Congress indicated that some future

offenders may be exempt from its registration requirements if they committed certain kinds of sex offenses but not others. 42 U.S.C. § 16911(5)(C), (7)(A), (7)(B), (8). Registration is required for life for some offenders but lesser periods for others. *Id.* § 16915(a). These periods can be reduced on good behavior. *Id.* § 16915(b)(1). In these circumstances, it would seem strange to suppose that the statute's prefatory statement of purpose — or, for that matter, provisions of the law discussing the treatment of future offenders — provides intelligible guidance for the Attorney General's treatment of past offenders. Especially when Congress went on to address past offenders specifically, exempted them from the automatic application of any of the statute's registration requirements, and left their treatment to the Attorney General.

Separately but relatedly, the Supreme Court has instructed that under the intelligible principle test "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman*, 531 U.S. at 475. Faint echos of detail doctrine can be found here: less direction may be required when Congress leaves it to the Executive to define what constitutes a "country elevator[]" and more may be required when Congress seeks to endow the Executive with the power to create regulations that affect the national economy. *Id.* So even assuming that a preamble detached from the provision granting discretion to the Executive might suffice to supply an intelligible principle in some circumstances, it certainly won't always. And once again it's hard to see

how the discretion conferred here is anything less than extraordinary — in its breadth (allowing the Attorney General to apply none, some, or all of SORNA's requirements to none, some, or all past offenders), in its subject matter (effectively defining a new crime), in its chosen delegate (the nation's top prosecutor), and in the number of people affected (half a million). All factors suggesting more, not less, guidance is required.

Neither is it any answer to say that, though the Attorney General wants for any intelligible principle to guide him in deciding which requirements to impose on which past offenders, at least his discretion finds some boundaries in the statute (he cannot exceed the full application of all of SORNA's requirements). Delegation doctrine teaches that Congress must set *both* the "boundaries" of the Executive's discretion *and* supply an "intelligible principle" for the exercise of that discretion within those boundaries. *Mistretta*, 488 U.S. at 372-73. After all and again, the point of the delegation doctrine isn't so much that some poor Executive agent tasked with the thankless job will necessarily perform poorly within the bounds and metes of the discretion set for him. It is that decoupling the exercise of his discretion so much from legislative direction deprives the people of the structural protections guaranteed by the first section of the first article of the Constitution.

There remains much less room still for debate about the proper outcome of this case when the "intelligible principle" test gives way to a more "meaningful" one in the criminal setting. After all, SORNA's delegation contains none of the three factors that *Touby* found reassuring and that circuit courts have since used to assess delegation challenges in the criminal context. First, the statute provides no generally applicable rule for past offenders for the Attorney General to follow contingent only on specified factual findings. Rather, the Attorney General may apply all, some or none of the requirements of the Act however he sees fit. Second, the statute requires no factual findings of the Attorney General of any kind. Third, it offers no guidance about these non-existent factual findings.

To be sure, Congress could have easily written a statute with such constraints, and to remedy the delegation problem here it might still. For example, Congress could have tasked the Attorney General with the job of determining what factors correlate with recidivism or present an unreasonable danger to the public and make his determinations based on those considerations. When deciding which past offenders should be required to register Congress could have required the Attorney General to examine, as well, factors like the recency of the violation; the nature of the sex offense; the number of past violations; the offender's age, family, residential, or occupational circumstances; or the offender's mental or physical health — or banned consideration of any of these factors. It's easy to imagine all sorts of ways Congress might have

constrained — and might still constrain — the Attorney General's discretion in ways parallel to *Touby*. But and by the government's own admission, we have nothing of the kind here. And that leaves us well outside the ballpark when it comes to satisfying *Touby*'s test. Indeed, you might wonder if we are even on Yawkey Way. *See* Sadik, *supra* n.1, at 298 (arguing that SORNA fails *Touby*'s test).

Delegation doctrine may not be the easiest to tease out and it has been some time since the Court has held a statute to cross the line. But it has also been some time since the courts have encountered a statute like this one — one that, if allowed to stand, would require the Judiciary to endorse the notion that Congress may effectively pass off to the prosecutor the job of defining the very crime he is responsible for enforcing. By any plausible measure we might apply that is a delegation run riot, a result inimical to the people's liberty and our constitutional design.

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 151. Child Protection and Safety
Subchapter I. Sex Offender Registration and Notification
Part A. Sex Offender Registration and Notification

42 U.S.C.A. § 16911

§ 16911. Relevant definitions, including Amie Zyla expansion of sex offender definition and expanded inclusion of child predators

Effective: July 27, 2006
Currentness

In this subchapter the following definitions apply:

(1) Sex offender

The term "sex offender" means an individual who was convicted of a sex offense.

(2) Tier I sex offender

The term "tier I sex offender" means a sex offender other than a tier II or tier III sex offender.

(3) Tier II sex offender

The term "tier II sex offender" means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and--

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

(i) sex trafficking (as described in section 1591 of Title 18);

(ii) coercion and enticement (as described in section 2422(b) of Title 18);

(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a))[1] of Title 18;

(iv) abusive sexual contact (as described in section 2244 of Title 18);

(B) involves--

(i) use of a minor in a sexual performance;

(ii) solicitation of a minor to practice prostitution; or

(iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a tier I sex offender.

(4) Tier III sex offender

The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and--

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or

(ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a tier II sex offender.

(5) Amie Zyla expansion of sex offense definition

(A) Generally

Except as limited by subparagraph (B) or (C), the term " sex offense" means--

(i) a criminal offense that has an element involving a sexual act or sexual contact with another;

(ii) a criminal offense that is a specified offense against a minor;

(iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of Title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of Title 18;

(iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or

(v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

(B) Foreign convictions

A foreign conviction is not a sex offense for the purposes of this subchapter if it was not obtained with sufficient safeguards for fundamental fairness and due process for the accused under guidelines or regulations established under section 16912 of this title.

(C) Offenses involving consensual sexual conduct

An offense involving consensual sexual conduct is not a sex offense for the purposes of this subchapter if the victim was an adult, unless the adult was under the custodial authority of the offender at the time of the offense, or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.

(6) Criminal offense

The term "criminal offense" means a State, local, tribal, foreign, or military offense (to the extent specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note)) or other criminal offense.

(7) Expansion of definition of "specified offense against a minor" to include all offenses by child predators

The term "specified offense against a minor" means an offense against a minor that involves any of the following:

(A) An offense (unless committed by a parent or guardian) involving kidnapping.

(B) An offense (unless committed by a parent or guardian) involving false imprisonment.

(C) Solicitation to engage in sexual conduct.

(D) Use in a sexual performance.

(E) Solicitation to practice prostitution.

(F) Video voyeurism as described in section 1801 of Title 18.

(G) Possession, production, or distribution of child pornography.

(H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.

(I) Any conduct that by its nature is a sex offense against a minor.

(8) Convicted as including certain juvenile adjudications

The term "convicted" or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of Title 18), or was an attempt or conspiracy to commit such an offense.

(9) Sex offender registry

The term "sex offender registry" means a registry of sex offenders, and a notification program, maintained by a jurisdiction.

(10) Jurisdiction

The term "jurisdiction" means any of the following:

(A) A State.

(B) The District of Columbia.

(C) The Commonwealth of Puerto Rico.

(D) Guam.

(E) American Samoa.

(F) The Northern Mariana Islands.

(G) The United States Virgin Islands.

(H) To the extent provided and subject to the requirements of section 16927 of this title, a federally recognized Indian tribe.

(11) Student

The term "student" means an individual who enrolls in or attends an educational institution, including (whether public or private) a secondary school, trade or professional school, and institution of higher education.

(12) Employee

The term "employee" includes an individual who is self-employed or works for any other entity, whether compensated or not.

(13) Resides

The term "resides" means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives.

(14) Minor

The term "minor" means an individual who has not attained the age of 18 years.

CREDIT(S)

(Pub.L. 109-248, Title I, § 111, July 27, 2006, 120 Stat. 591.)

Notes of Decisions (46)

Footnotes

1 So in original. The second closing parenthesis probably should follow "18".

42 U.S.C.A. § 16911, 42 USCA § 16911

Current through P.L. 114-25 (excluding P.L. 114-18) approved 6-15-2015

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 151. Child Protection and Safety
Subchapter I. Sex Offender Registration and Notification
Part A. Sex Offender Registration and Notification

42 U.S.C.A. § 16913

§ 16913. Registry requirements for sex offenders

Effective: July 27, 2006
Currentness

(a) In general

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration

The sex offender shall initially register--

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) Initial registration of sex offenders unable to comply with subsection (b) of this section

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.

(e) State penalty for failure to comply

Next

Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

CREDIT(S)

(Pub.L. 109-248, Title I, § 113, July 27, 2006, 120 Stat. 593.)

Notes of Decisions (189)

42 U.S.C.A. § 16913, 42 USCA § 16913
Current through P.L. 114-25 (excluding P.L. 114-18) approved 6-15-2015

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Code of Federal Regulations
Title 28. Judicial Administration
Chapter I. Department of Justice
Part 72. Sex Offender Registration and Notification (Refs & Annos)

28 C.F.R. § 72.3

§ 72.3 Applicability of the Sex Offender Registration and Notification Act.

Effective: May 1, 2011
Currentness

The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.

Example 1. A sex offender is federally convicted of aggravated sexual abuse under 18 U.S.C. 2241 in 1990 and is released following imprisonment in 2007. The sex offender is subject to the requirements of the Sex Offender Registration and Notification Act and could be held criminally liable under 18 U.S.C. 2250 for failing to register or keep the registration current in any jurisdiction in which the sex offender resides, is an employee, or is a student.

Example 2. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required but relocates to another state in 2009 and fails to register in the new state of residence. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in any jurisdiction in which he resides, and could be held criminally liable under 18 U.S.C. 2250 for the violation because he traveled in interstate commerce.

Credits
[Order No. 3239–2010, 75 FR 81853, Dec. 29, 2010]

SOURCE: Order No. 2868–2007, 72 FR 8897, Feb. 28, 2007, unless otherwise noted.

AUTHORITY: Pub.L. 109–248, 120 Stat. 587.

Notes of Decisions (34)

Current through July 9, 2015; 80 FR 39388.

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RECORD AND BRIEFS

ORIGINAL

No. 15-5238

Supreme Court, U.S.
FILED
SEP 16 2015
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

LESTER RAY NICHOLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner violated 18 U.S.C. 2250(a) by failing to update his sex-offender registration under the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. 16901 et seq., when he abandoned his residence in Kansas and moved to the Philippines.

2. Whether SORNA's delegation of authority to the Attorney General to issue regulations under 42 U.S.C. 16913(d) violates the nondelegation doctrine.

IN THE SUPREME COURT OF THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 775 F.3d 1225. The order of the court of appeals denying rehearing (Pet. App. 25-49) is reported at 784 F.3d 666. The order of the district court denying petitioner's motion to dismiss (Pet. App. 16-24) is not reported in the Federal Supplement but is available at 2013 WL 6000016.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2014. A petition for rehearing was denied on April 15, 2015 (Pet. App. 25-26). The petition for a writ of certiorari was filed

on July 14, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea of guilty in the United States District Court for the District of Kansas, petitioner was convicted of failing to update his registration as a sex offender, in violation of 18 U.S.C. 2250(a). He was sentenced to ten months of imprisonment. The court of appeals affirmed.

1. Since at least 1996, all 50 States and the District of Columbia have had sex-offender-registration laws. See Smith v. Doe, 538 U.S. 84, 90 (2003). On July 27, 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. 16901 et seq., which "establishe[d] a comprehensive national system for the registration of [sex] offenders." 42 U.S.C. 16901.

SORNA requires, as a matter of federal law, every sex offender to "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. 16913(a). SORNA defines a "sex offender" as "an individual who was convicted of a sex offense" that falls within the statute's defined offenses. 42 U.S.C. 16911(1) and (5)-(7). SORNA provides that a sex offender "shall initially register" either "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement" or, "if the sex offender is not sentenced to a

term of imprisonment," "not later than 3 business days after being sentenced for that offense." 42 U.S.C. 16913(b). SORNA also directs that, "not later than 3 business days after each change of name, residence, employment, or student status," a sex offender "shall * * * appear in person in at least 1 jurisdiction involved pursuant to subsection (a) [i.e., where the sex offender resides, is an employee, or is a student] and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry." 42 U.S.C. 16913(c). And SORNA delegates to the Attorney General the permissive authority to promulgate regulations in certain situations:

> Initial registration of sex offenders unable to comply with subsection (b) of this section
>
> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

42 U.S.C. 16913(d).

To enforce those registration requirements, Congress created a federal criminal offense penalizing nonregistration. See 18 U.S.C. 2250(a). Under 18 U.S.C. 2250(a), a convicted sex offender who "is required to register under [SORNA]," "travels in interstate or foreign commerce," and then "knowingly fails to register or update a registration as required by [SORNA]" may be punished by up to ten years of imprisonment. Carr v. United States, 560 U.S. 438, 445-

446 (2010) (quoting 18 U.S.C. 2250(a)). Sex offenders convicted before the Act's enactment on July 27, 2006, were not "required to register under [SORNA]" until the Attorney General exercised his delegated authority under 42 U.S.C. 16913(d) to "specif[y] that the Act's registration provisions apply to them." Reynolds v. United States, 132 S. Ct. 975, 980 (2012).

On February 28, 2007, the Attorney General issued an interim rule, effective on that date, specifying that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. 72.3. On July 2, 2008, the Attorney General (in coordination with the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking) promulgated final guidelines for the States and other jurisdictions on matters of SORNA's implementation. See Office of the Att'y Gen., U.S. Dep't of Justice, The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030. The guidelines were issued after notice and comment and they reaffirmed SORNA's application to all sex offenders. Id. at 38,035-38,036, 38,046, 38,063.[1]

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[1] On December 29, 2010, the Federal Register published an Attorney General order finalizing the interim rule, with one clarifying change in an example to avoid any inconsistency with this Court's decision in Carr, supra. See Office of the Att'y Gen., U.S. Dep't of Justice, Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. 81,849.

2. In 2003, petitioner was convicted of traveling interstate with intent to have sex with a minor, in violation of 18 U.S.C. 2423(b), and was sentenced to a 120-month term of imprisonment. Petitioner's conviction occurred before SORNA's enactment in 2006, but he was subject to SORNA's requirements under the Attorney General's rule. See 28 C.F.R. 72.3; Pet. App. 2.

By 2012, petitioner was released from prison and had been placed on federal supervision in the District of Kansas. Until that time, petitioner had complied with registration requirements under both SORNA and Kansas law. In November 2012, however, petitioner flew from Kansas City to Manila, Philippines, without updating his sex-offender registration. One month later, he was arrested by Filipino law-enforcement officers and deported to the United States. Pet. App. 3.

Charged with a violation of Section 2250(a), petitioner moved to dismiss the indictment before trial on the grounds that he did not violate SORNA while in the Philippines and that SORNA's registration provision violates the nondelegation doctrine. The district court denied the motion. Pet. App. 16-24. Petitioner entered a conditional guilty plea that allowed him to raise both issues on appeal. Id. at 4.

3. The court of appeals affirmed. Pet. App. 1-15. With respect to petitioner's statutory-construction argument, the court held that petitioner violated SORNA when he left his residence in

Kansas and moved to the Philippines without updating his registration to reflect that Kansas was no longer his residence. Id. at 5-9. The court relied on its previous decision in United States v. Murphy, 664 F.3d 798 (10th Cir. 2011), which also involved a registered sex offender who left his residence in the United States and moved to a foreign country. In Murphy, the court reasoned that when a sex offender abandons his current living place, that constitutes a "change" of residence that triggers the obligation under Section 16913(c) to update a sex-offender registration, even if the offender has not yet established a new residence. Id. at 801-803. Murphy further concluded that, when an offender leaves his residence in a State and also leaves the State altogether, that State remains a "jurisdiction involved" under SORNA. Id. at 803. And it concluded that the obligation to update the registration to reflect the abandoned residence does not disappear simply because the sex offender relocates to a non-SORNA jurisdiction (such as a foreign country) before the three-day deadline for updating his registration passes. Ibid. The decision below reiterated those three propositions from Murphy, Pet. App. 6-7, and also rejected petitioner's contention that the decision in Murphy is inconsistent with this Court's earlier decision in Carr, supra, Pet. App. 8.

With respect to petitioner's constitutional argument, the court of appeals concluded that Section 16913(d)'s delegation to the Attorney General does not violate the nondelegation doctrine.

Pet. App. 9-13. It reasoned that Congress had given the Attorney General sufficiently intelligible principles upon which to exercise his delegated authority, had delineated the boundaries of that authority by limiting the delegation to pre-enactment sex offenders, and imposed other limits by identifying the crimes subject to SORNA as well as the time, place, and method of registration. Id. at 10-12. The court rejected petitioner's contention that it should evaluate the delegation under "the more rigorous 'meaningfully constrains' standard instead of the 'intelligible principle' standard" traditionally associated with the nondelegation doctrine. Id. at 12-13.

Judge McKay concurred. Pet. App. 15. He agreed with the panel's constitutional analysis and also agreed that its statutory-interpretation holding was controlled by Murphy, though he expressed his disagreement with Murphy itself. Ibid.

4. The court of appeals denied rehearing en banc. Pet. App. 25. Judges Lucero and Gorsuch filed opinions dissenting from the denial. Judge Lucero characterized the Eighth Circuit's decision in United States v. Lunsford, 725 F.3d 859, 860 (8th Cir. 2013), as having "created a circuit split" with the Tenth Circuit's decision in Murphy "regarding the applicability of SORNA's notice provisions to offenders who leave the country." Pet. App. 27. Judge Lucero noted that he continued to disagree with Murphy (in which he had dissented). Ibid. He agreed with Judge Gorsuch that it would also

be appropriate to grant rehearing on the nondelegation question. Id. at 28.

Judge Gorsuch's opinion dissenting from the denial of rehearing noted a "split" between Murphy and Lunsford, Pet. App. 29, but focused principally on the nondelegation question, concluding that SORNA's delegation to the Attorney General would impermissibly allow the prosecutor to play a role in defining a crime that he is responsible for enforcing, id. at 29-49.

ARGUMENT

1. Petitioner contends (Pet. 12-25) that the court of appeals erred in holding that he was required by SORNA to update his registration in Kansas when he abandoned his residence there to move to the Philippines. That contention lacks merit. Although there is tension between the reasoning of the decision below and that of the Eighth Circuit's decision in United States v. Lunsford, 725 F.3d 859 (2013), there is no square conflict between them, and the issue has arisen in only a handful of reported cases. Further review is unwarranted.

a. The court of appeals correctly concluded that petitioner was required to update his registration to reflect a change in his residence when he abandoned his Kansas residence and then traveled to the Philippines. In petitioner's view, the obligation that SORNA imposes on a sex offender to keep his registration information "current," 42 U.S.C. 16913(a) -- including information about

any "changes in the information" about his residence, 42 U.S.C. 16913(c) -- applies only as long as he continues to reside, work, or study in at least one jurisdiction where he is subject to SORNA's registration requirements. Because the Philippines (the location of his new residence) was not such a jurisdiction, see 42 U.S.C. 16911(10), petitioner contends (Pet. 19-22) that there was no "jurisdiction involved" in which he was required to report, "not later than 3 business days after each change of * * * residence," to "inform that jurisdiction of all changes in the information required for that offender in the sex offender registry," 42 U.S.C. 16913(c).

As the court of appeals explained, however, petitioner's obligation under Section 16913 to update his registration information to reflect a change of residence was triggered when he abandoned his residence in Kansas, and, even though the statute permitted him three business days to make the update, the obligation did not disappear simply because he had subsequently established a new residence in a non-SORNA jurisdiction. Pet. App. 6-7; see United States v. Murphy, 664 F.3d 798, 801-803 (10th Cir. 2011). Moreover, when petitioner's obligation to update his registration information to reflect his abandonment of Kansas was triggered, Kansas was still a "jurisdiction involved" under SORNA. Id. at 803.

In response, petitioner contends (Pet. 21-22) that it would have been impractical for him to return from the Philippines within three business days to make the update in person, and he further contends (Pet. 23-24) that SORNA's purposes would not be served by requiring offenders to give notice when they are moving to a foreign country rather than another SORNA jurisdiction. But petitioner did not have to return to Kansas to update his registration; he could have complied with his obligation by informing Kansas authorities in advance of his travel that he was abandoning his Kansas residence. And such an update would have served SORNA's purposes by ensuring that its "comprehensive" national sex-offender registration system would be "more uniform and effective" than the prior "patchwork" of registration systems, because it would have prevented that system from containing erroneously outdated and affirmatively misleading information about a sex offender's "current" residence. Reynolds v. United States, 132 S. Ct. 975, 978 (2012).

For those reasons, the SORNA Guidelines issued by the Attorney General in 2008 explained that a sex offender must "inform the jurisdiction if the sex offender is terminating residence * * * in the jurisdiction, even if there is no ascertainable or expected future place of residence." 73 Fed. Reg. at 38,066. The Guidelines further explained that the same requirement is triggered when an offender moves overseas. See id. at 38,066-38,067 ("If a sex

offender simply leaves the country and does not inform the jurisdiction or jurisdictions in which he has been registered, then the requirement to keep the registration current will not have been fulfilled. Rather, the registry information in the domestic jurisdictions will show that the sex offender is residing in the jurisdiction (or present as an employee or student) when that is no longer the case."); see also 76 Fed. Reg. 1637 (2011) (explaining that such notifications also assist the federal government in complying with its obligation under 42 U.S.C. 16928 to "establish and maintain a system" for informing SORNA jurisdictions "about persons entering the United States who are required to register").[2]

b. Petitioner further errs in contending (Pet. 19-20) that the court of appeals' analysis conflicts with this Court's decision in Carr v. United States, 560 U.S. 438 (2010). In Carr, the Court held that the federal criminal offense of failing to register under 18 U.S.C. 2250(a) is inapplicable when a sex offender's only travel in interstate commerce occurred before SORNA became effective and imposed a registration obligation on him. Id. at 442. In doing so, the Court accepted the parties' understanding that all three elements of a Section 2250(a)(2)(B) violation -- a requirement to register under SORNA, travel in interstate or foreign commerce, and

---

[2] In addition to the Guidelines, the Department of Justice has developed and expects to publish proposed regulations consistent with the decision below that articulate sex offenders' obligations under SORNA to report to their jurisdictions of residence before they relocate to a foreign country.

a knowing failure to register or update a registration -- must occur "in sequence." Id. at 446. That is consistent with the decision below. Although petitioner's obligation to update his registration was triggered when he was still in Kansas, and before he had traveled to the Philippines, his failure to update the registration became complete only when the three-business-day deadline had elapsed. See United States v. Lewis, 768 F.3d 1086, 1091 n.4 (10th Cir. 2014) ("[W]e simply hold that a conditional obligation [to update the registration] is triggered when the offender abandons his residence, not when he crosses state lines. When the offender thereafter completes steps two (crossing state lines) and three (failing to register) sequentially, he is subject to prosecution in the departure district.").[3]

c. Petitioner's reliance (Pet. 24) on the rule of lenity is also misplaced. The rule of lenity "is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of [a statute], such that even after a court has seized every thing from which aid can be derived, it is still left with an

---

[3] Petitioner relies (Pet. 20) on Carr's refusal to read the present-tense reference to someone who "'resides i[n] Indian country'" as including "persons who once resided in Indian country but who left before SORNA's enactment." 560 U.S. at 449 (quoting 18 U.S.C. 2250(a)(2)(B)). The decision below, however, turns on where petitioner was residing when he abandoned his Kansas residence in November 2012, years after SORNA was enacted and petitioner was made subject to its requirement that he "register, and keep the registration current, in each jurisdiction where [he] resides." 42 U.S.C. 16913(a).

ambiguous statute." Chapman v. United States, 500 U.S. 453, 463 (1991) (internal quotation marks, brackets, and citation omitted). As discussed above, no grievous ambiguity or "equipoise of competing reasons" (Johnson v. United States, 529 U.S. 694, 713 n.13 (2000)) exists in the phrase "jurisdiction where the offender resides" in Section 16913(a) or in the term "residence" in Section 16913(c). Nor does any tension between the decision below and an Eighth Circuit decision (discussed below) require application of the rule of lenity. This Court has repeatedly rejected the contention that a division in judicial authority establishes that a statute is "ambiguous" for purposes of lenity. See, e.g., Reno v. Koray, 515 U.S. 50, 64-65 (1995); Moskal v. United States, 498 U.S. 103, 108 (1990); see also United States v. Hayes, 555 U.S. 415, 420, 429 (2009) (noting division among circuits before finding the rule of lenity inapplicable in a criminal case).

d. Petitioner contends (Pet. i, 3, 12-17) that the decision below conflicts with the Eighth Circuit's decision in Lunsford, supra, but no square conflict exists, because Lunsford involved a factual scenario that is distinguishable from this case. In Lunsford, the court held that SORNA's requirement for a sex offender to update his registration did not apply to a sex offender who moved from Kansas City, Missouri, to the Philippines, because it found "no textual basis for requiring an offender to update his registration in a jurisdiction where he formerly 'resided.'" 725

F.3d at 861. In doing so, however, the court emphasized that Lunsford was not required to notify Missouri of his change of residence because the "stipulated factual basis for [his] guilty plea demonstrate[d] that he did not reside in Missouri when he changed his residence." Ibid. (emphasis added). As the court explained, on May 3, Lunsford had "boarded a flight from Kansas City to the Philippines on a round-trip ticket, with a return scheduled for May 24," id. at 860, but he "did not change his residence and trigger a reporting obligation until after he left the United States" and decided not to use the return ticket, id. at 861 (emphasis added).

Here, by contrast, petitioner was still residing in Kansas when he abandoned that residence, which required him to update his registration in at least one jurisdiction within three days of that change of residence, even if he had not already established a new residence. Although Lunsford rejected the government's reliance on the Tenth Circuit's decision in Murphy, it indicated that it disagreed with the Tenth Circuit only to the extent that the latter would allow a registration obligation to be triggered in a place of former rather than current residence. 725 F.3d at 862. Murphy itself anticipated precisely such a distinction. See 664 F.3d at 804 ("In contrast, if a sex offender is already living abroad when a change of employment or residence occurs, SORNA does not require the offender to update the registry of a prior SORNA jurisdic-

tion."). And that distinction has been recognized by the only other court that appears to have addressed the potential conflict between Murphy and Lunsford. See Carr v. United States, No. 2:13-00091, 2014 WL 655382, at *5 (M.D. Tenn. Feb. 20, 2014) (noting that "the facts at issue in [Lunsford] suggest a more limited holding" than in the Tenth Circuit's cases because Lunsford "did not decide to change his residence (and not use the return plane ticket) until after he left the United States"), appeal pending, No. 14-5368 (6th Cir. briefing completed on Mar. 2, 2015).

Finally, the question whether a sex offender's move to a foreign country triggers a SORNA obligation to update a registration has apparently arisen in only a handful of cases (the three cases mentioned in the preceding paragraph and the Tenth Circuit's decisions in Lewis, supra; United States v. Forster, 549 Fed. Appx. 757 (2013); and this case). And petitioner himself cannot claim that he lacked notice about SORNA's applicability, since his failure to update his registration occurred in November 2012 (Pet. App. 3), nearly a year after the Tenth Circuit's decision in Murphy and more than eight months before the Eighth Circuit's decision in Lunsford. Under the circumstances, further review of the statutory-construction question is unwarranted.

2. With respect to the second question presented, petitioner contends (Pet 25-32) that SORNA's delegation of authority to the Attorney General to issue regulations under 42 U.S.C. 16913(d)

violates the nondelegation doctrine. Every court of appeals to decide such a nondelegation challenge to SORNA has rejected it -- ten of them in published decisions and one in multiple unpublished ones. See, e.g., Pet. App. 9-13 (10th Cir.); United States v. Richardson, 754 F.3d 1143, 1145-1146 (9th Cir. 2014); United States v. Cooper, 750 F.3d 263, 266-272 (3d Cir.), cert. denied, 135 S. Ct. 209 (2014); United States v. Goodwin, 717 F.3d 511, 516-517 (7th Cir. 2013), cert. denied, 134 S. Ct. 334 (2013); United States v. Kuehl, 706 F.3d 917, 919-920 (8th Cir. 2013); Parks v. United States, 698 F.3d 1, 7-8 (1st Cir. 2012), cert. denied, 133 S. Ct. 2021 (2013); United States v. Felts, 674 F.3d 599, 606 (6th Cir. 2012); United States v. Guzman, 591 F.3d 83, 91-93 (2d Cir.), cert. denied, 561 U.S. 1019 (2010); United States v. Whaley, 577 F.3d 254, 262-264 (5th Cir. 2009); United States v. Ambert, 561 F.3d 1202, 1212-1214 (11th Cir. 2009); see also United States v. Sampsell, 541 Fed. Appx. 258, 259 (4th Cir. 2013) (noting that the Fourth Circuit has "consistently rejected similar non-delegation challenges in unpublished decisions").

This Court has repeatedly denied petitions for a writ of certiorari raising the same nondelegation claim, and it has continued to do so after Justice Scalia's January 2012 dissenting opinion in Reynolds, on which petitioner relies (Pet. 30, 31). See, e.g., Harges v. United States, 135 S. Ct. 507 (2014) (No. 14-6748); Stacey v. United States, 135 S. Ct. 419 (2014) (No. 14-6321);

Crosby v. United States, 135 S. Ct. 390 (2014) (No. 14-6167); Cooper v. United States, 135 S. Ct. 209 (2014) (No. 14-5174); Atkins v. United States, 134 S. Ct. 56 (2013) (No. 12-9062); Mitchell v. United States, 133 S. Ct. 2854 (2013) (No. 12-8807); Parks v. United States, 133 S. Ct. 2021 (2013) (No. 12-8185); Clark v. United States, 133 S. Ct 930 (2013) (No. 12-6067); Rogers v. United States, 133 S. Ct. 157 (2012) (No. 11-10450); Yelloweagle v. United States, 132 S. Ct. 1969 (2012) (No. 11-7553); Johnson v. United States, 132 S. Ct. 135 (2011) (No. 10-10330); Beasley v. United States, 562 U.S. 801 (2010) (No. 09-10316); May v. United States, 556 U.S. 1258 (2009) (No. 08-7997). There is no reason for a different outcome here.

This Court's decisions recognize that the nondelegation doctrine is satisfied when a statutory grant of authority sets forth an "intelligible principle" that "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." Mistretta v. United States, 488 U.S. 361, 372-373 (1989) (citation omitted). As the Court has repeatedly observed, it has found only two statutes that lacked the necessary "intelligible principle" -- and it has not found any in the last 70 years. Whitman v. American Trucking Ass'ns, 531 U.S. 457, 474 (2001) (referring to A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), and Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935)); see Loving v. United States, 517 U.S. 748, 771 (1996)

(same); Mistretta, 488 U.S. at 373 (same); id. at 416 (Scalia, J., dissenting) (explaining that the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law").

In enacting SORNA, Congress "broadly set policy goals that guide the Attorney General" -- it "created SORNA with the specific design to provide the broadest possible protection to the public, and to children in particular, from sex offenders." Ambert, 561 F.3d at 1213. Congress appropriately identified the Attorney General as its agent, see 42 U.S.C. 16913(d), and it "made virtually every legislative determination in enacting SORNA, which has the effect of constricting the Attorney General's discretion to a narrow and defined category." Ambert, 561 F.3d at 1214; see Guzman, 591 F.3d at 93 (explaining that Congress delineated the crimes requiring registration, the circumstances of registration, the information required to register, and the penalties for non-registration, leaving to the Attorney General only the applicability of SORNA to a discrete set of persons). This "Court has upheld much broader delegations than" Section 16913(d). Guzman, 591 F.3d at 93 (citing Mistretta, 488 U.S. at 372-373); cf. Touby v. United States, 500 U.S. 160, 165 (1991) (upholding the Attorney General's power to schedule controlled substances on a temporary basis). Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2015

No. 15-5238

IN THE SUPREME COURT OF THE UNITED STATES

LESTER RAY NICHOLS, PETITIONER

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION**, via email and first-class mail, postage prepaid, this 16th day of September, 2015.

[See Attached Service List]

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September 16, 2015

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Charlene Goodwin, Supervisor, Case Management, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov.** Ms. Goodwin's phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

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15-5238
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RECORD AND BRIEFS

Supreme Court, U.S.
FILED
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No. 15-5238

IN THE
SUPREME COURT OF THE UNITED STATES

LESTER RAY NICHOLS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED ii
Cases ii
Statutes ii
Other ii

PETITIONER'S REPLY BRIEF 1

I. Review Is Necessary To Resolve An Entrenched Conflict On Whether A Sex Offender Who Moves To A Foreign Country Must Register In The Jurisdiction Of His Former Residence 1

A. A "square conflict" exists 2

B. Until the conflict is resolved, SORNA's goal of uniformity will go unfulfilled 6

C. The Government's Defense Of The Decision Below Is Unpersuasive 8

II. Review Is Necessary To Determine Whether Congress's Delegation To The Attorney General To Determine Whether SORNA Applies to Pre-Enactment Sex Offenders Violates The Non-Delegation Doctrine 12

CONCLUSION 12

TABLE OF AUTHOR ITIES CITED

PAGE

Cases

Alleyne v. United States, 133 S.Ct. 2151 (2013) 12

Carr v. United States, 2014 WL 655382 (M.D. Tenn. Feb. 20, 2014) 3

Carr v. United States, 560 U.S. 438 (2010) 11

Johnson v. United States, 135 S.Ct. 2551 (2015) 12

Lockhart v. United States, No. 14-8358 5

Reynolds v. United States, 132 S.Ct. 975 (2012) 12

United States v. Branch, No. 4:15-cr-00025-AWA, Doc. 41 (E.D. Va. June 23, 2015) 3, 6

United States v. Lewis, 2015 WL 1308512 (D. Kan. March 28, 2013) 4

United States v. Lockhart, 135 S.Ct. 2350 (May 26, 2015) 6

United States v. Lunsford, 725 F.3d 859 (8th Cir. 2013) ..... passim

United States v. Murphy, 664 F.3d 798 (10th Cir. 2011) ..... passim

Statutes

42 U.S.C. § 16911(13) 8, 9

42 U.S.C. § 16913 11

42 U.S.C. § 16913(a) 8, 9

42 U.S.C. § 16913(c) 8, 10

42 U.S.C. § 16928 10

Other Authorities

The National Guidelines for Sex Offender Registration and Notification, 3 Fed. Reg. 38030-1 (July 2, 2008) 10

PETITIONER'S REPLY BRIEF

The Court should grant this petition because the lower courts are split on whether a sex offender who moves to a foreign country must update his sex offender registration in the jurisdiction where he formerly resided. The government's assertion that there is no "square conflict" on this issue lacks merit. Moreover, correcting this split is a matter of exceptional importance given Congress's stated goal of uniformity in the Sex Offender Registration and Notification Act ("SORNA").

Additionally, this Court should grant this petition to decide whether Congress's delegation to the Attorney General to determine the applicability of SORNA to pre-enactment offenders runs counter to the Constitution's principle of separation of powers. Thousands of individuals must register as sex offenders and face criminal penalties for failing to do so, not because Congress has said they must register, but because the Attorney General has said they must register. This delegation does not meaningfully constrain the Attorney General, nor does it establish an intelligible principle to guide the Attorney General in carrying out its obligations.

I. Review Is Necessary To Resolve An Entrenched Conflict On Whether A Sex Offender Who Moves To A Foreign Country Must Register In The Jurisdiction Of His Former Residence.

SORNA is Congress's latest attempt at establishing a uniform, national registration system for sex offenders. But this goal of uniformity is threatened by an entrenched conflict within the Circuits on whether a sex offender who moves to a foreign country must update his registration in the jurisdiction where he formerly resided. This case is an excellent vehicle to resolve that conflict.

For its part, the government disputes whether a conflict exists at all. The government acknowledges "tension" between the courts of appeals, but refuses to acknowledge a "square conflict" on the issue. BIO 8. The government also deems the issue unimportant because, in its view, the issue has not arisen in a sufficient number of cases. BIO 15. Neither point has merit. The courts of appeals themselves have acknowledged the conflict in factually indistinguishable cases, and, because the conflict upsets SORNA's goal of uniformity, it is in serious need of resolution.

A. A "square conflict" exists.

1. The Tenth Circuit itself has acknowledged that its decision below is in direct conflict with the Eighth Circuit's decision in *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013). Judge Lucero's dissent from the denial of rehearing en banc began: "I dissent from the denial of rehearing en banc because a recent Eighth Circuit decision creates a circuit split regarding the applicability of SORNA's notice provisions to offenders who leave the country." Pet. App. 27 (citing *Lunsford*). Judge Gorsuch's dissent began: "A circuit split lingers here." *Id.* 29. The panel found that it had "squarely addressed" this issue in *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011), and acknowledged that *Lunsford* "disagreed with *Murphy's* interpretation of SORNA." Pet. App. 6, 8. In a short concurrence, Judge McKay thought *Lunsford* in direct conflict with *Murphy*. *Id.* 15 ("I am persuaded by [*Lunsford*], however, the majority opinion in *Murphy* currently controls"). The district court below also found that *Lunsford* reached "a conclusion contrary to *Murphy*." *Id.* 4.

In *Lunsford*, the Eighth Circuit knowingly created this conflict – "insofar as

Murphy concluded that an offender who leaves a domestic jurisdiction for a foreign jurisdiction necessarily must update his registration in the domestic jurisdiction where he formerly resided, we respectfully disagree." 725 F.3d at 862. In support of its holding, the Eighth Circuit cited Judge Lucero's dissent in *Murphy*. *Id.*

Other courts have acknowledged the split. A district court judge in Virginia tasked with a similar issue considered *Lunsford* and *Murphy* and noted that "[t]he circuits are split on the issue." *United States v. Branch*, No. 4:15-cr-00025-AWA, Doc. 41 at 7 (E.D. Va. June 23, 2015); *see also Carr v. United States*, 2014 WL 655382 (M.D. Tenn. Feb. 20, 2014) (unpublished) (adopting the Tenth Circuit's rationale and opining that the Sixth Circuit would not adopt the reasoning in *Lunsford*), appeal pending, Sixth Circuit Case No. 14-5368 (briefing completed on March 2, 2015).

2. Contrary to these judicial statements, the government asserts that no conflict actually exists. It does so primarily in light of language in *Lunsford*. BIO 13-15. There, the Eighth Circuit suggested that the decision in *Murphy* might have turned on a factual finding that the defendant in that case "still resided in Utah within the meaning of § 16911(13) when he changed his residence and triggered his reporting obligation." *Id.* The government also cites the Tennessee district court's decision in *Carr*, which suggests that *Murphy* and *Lunsford* might not conflict because the defendant in *Lunsford* purchased a round-trip ticket, whereas the defendant in *Murphy* did not. 2014 WL 655382 at *5.

The government's argument lacks merit. Even assuming that *Lunsford* and

Murphy could be reconciled,[1] *Lunsford* and the decision in this case cannot be reconciled. Like the defendant in *Lunsford*, Mr. Nichols bought a round-trip ticket when he flew to the Philippines. As the government itself explained in the district court:

> [T]he defendant purchased a round trip ticket. For his out-bound air-travel, the defendant flew from Kansas City, Missouri (MCI) to Detroit, Michigan (DTW) on November 9, 2012. The defendant had an approximately 2 hour layover in Detroit before flying on to Manila, Phillipines [sic] (MNL), with a schedule arrival time of 12:05am on November 11, 2012. The defendant's scheduled return ticket was for December 13, 2012, with travel through New York City (JFK) to a final destination of Kansas City, Missouri.

Gov't Response to Motion to Dismiss Indictment, Docket No. 17 at 1-2 (filed Oct. 29, 2013).

As Judge Lucero pointed out in dissent below, there is no difference between the facts in this case and the facts in *Lunsford*. Pet. App. 27. Both defendants abandoned residences in SORNA jurisdictions, boarded planes at the airport in Kansas City, Missouri, without first establishing new residences, purchased round-trip tickets to the Philippines, flew to the Philippines, established residences there, and did not return to the United States (until extradited by the government). Yet, courts have held that Robert Lunsford did not commit a crime but Lester Nichols did. The government is wrong to assert that no square conflict exists on this issue. The conflict is as square as it gets.

---

[1] Any reconciliation would fail. The better reading of *Lunsford* recognises the Eighth Circuit's struggle to make sense of the decision in *Murphy*. The Eighth Circuit was frank on this point, noting that *Murphy* "is no model of clarity." 725 F.3d at 862 (quoting *United States v. Lewis*, 2015 WL 1308512 (D. Kan. March 28, 2013) (unpublished)). The Tenth Circuit's extension of *Murphy* to the facts of this case – facts which are identical to those in *Lunsford* – confirms that the legal propositions in *Murphy* conflict with those in *Lunsford*.

3. Moreover, the government's claim that *Lunsford* turned on the purchase of a round-trip ticket, and not a one-way ticket, is implausible. BIO 14. The government cobbles together portions of *Lunsford* for the proposition that this fact was material to the outcome of the case. *Id.* It misrepresents *Lunsford*'s holding as standing for the proposition that the defendant in *Lunsford* did not change residences until he "decided not to use the return ticket." *Id.*

Lunsford says no such thing. In rejecting the government's argument that the defendant had to update his registration in Missouri, the Court noted that the government did not contend "that Lunsford established a new residence in Missouri after he abandoned his residence on Northwest Plaza Drive and before he boarded his flight to the Philippines." 725 F.3d at 861. The clear implication from this comment is that the abandonment of a residence, in and of itself, does not trigger a reporting obligation. Instead, "Lunsford changed his residence when he moved to the Philippines," thus triggering his reporting obligation only after "he changed his residence." *Id.* In contrast, the Tenth Circuit holds that "the abandonment of a permanent residence triggers a sex offender's obligation to update his registration," and 'the departure district remains a 'jurisdiction involved' even after the sex offender has left the state.'" Pet. App. 7. The conflict is obvious.

4. This case is not the first time in which the government has attempted to convince this Court that an obvious conflict is not actually a conflict. As one example, it employed a similar tactic recently in *Lockhart v. United States*, No. 14-8358, BIO 8-9. Despite the government's assurances that a conflict did not exist, this Court

granted certiorari in *Lockhart* to resolve a conflict in the Circuits on the meaning of a federal statute. 135 S.Ct. 2350 (May 26, 2015). The Court should do the same in this case.

B. Until the conflict is resolved, SORNA's goal of uniformity will go unfulfilled.

1. The government further argues that review is unwarranted because too few courts have addressed the issue. BIO 15. But the issue is currently pending in the Sixth Circuit, as the government mentions. BIO 15. Moreover, a district court recently grappled with the issue and found *Lunsford*, not *Murphy*, persuasive, resulting in the dismissal of a failure-to-update count. *Branch*, No. 4:15-cr-00025-AWA, Doc. 41 (E.D. Va. June 23, 2015).

The issue in *Branch* actually involved an *interstate* change in residence, not an *international* change in residence. The defendant moved from Michigan to Virginia, and the district court held that he could not be prosecuted for failing to notify Michigan authorities of his residency change. *Id.* at 9. *Branch* signifies that the conflict in this case arguably reaches beyond international travel to include the more common scenario of interstate travel. With this in mind, it is improbable to believe that this issue will not arise with sufficient frequency to warrant this Court's review.

Moreover, because the conflict is already entrenched, it does not matter how, or when, other Circuits resolve the issue. Whatever other Circuits do with it, the conflict will still persist. The government cannot deny that a majority of the Tenth Circuit has no intent to overrule its precedent in light of *Lunsford*. Only four of the twelve active judges voted to rehear this case en banc. Pet. App. 25. Nor does the government

assert that the Eighth Circuit would be inclined to reconsider *Lunsford*. Citing Judge Lucero's dissent in *Murphy*, *Lunsford* expressly disagreed with the Tenth Circuit's resolution of this issue in a case factually identical to this case. 725 F.3d at 862. The conflict will exist until this Court resolves it. There is no reason to let the conflict linger. It is best to resolve it now and end the confusion that exists in the lower courts.

2. The government fails to acknowledge that the conflict has serious consequences for SORNA's goal of uniformity. It is impossible to implement a uniform sex offender registry when jurisdictions have different rules for registration. The reality is that, as it currently stands, sex offenders who move to a foreign country (and possibly even a different state) are obligated to register in the jurisdiction of their former residence only if they live in certain jurisdictions (such as the jurisdictions within the Tenth Circuit and whatever other jurisdictions outside of those in the Eighth Circuit that choose to follow the Tenth Circuit's reasoning). That is not a uniform registration system.

Judge Lucero made this point in dissent below: "[w]e have simply replaced a 'wide disparity among State registration requirements with a wide disparity among Circuit registration requirements. In doing so, we thwart the intent of Congress and needlessly complicate an already complicated law." Pet. App. 27. "Correcting this circuit split is a matter of exceptional importance given the express purpose of Congress in enacting SORNA to remedy 'a wide disparity among State registration requirements and notification obligations for sex offenders.'" *Id.*

The government ignores Judge Lucero's dissent. This Court should not. There is

an entrenched conflict on whether a sex offender who moves to a foreign country must register in the jurisdiction in which he formerly resided. As long as this conflict persists, Congress will never achieve SORNA's stated goal of a national, uniform sex offender registration system. Review is necessary. Pet. App. 29 (Gorsuch, J., dissenting) ("In denying rehearing today to reconsider this court's position in light of *Lunsford*'s learning, we leave those who seek a resolution of this circuit split to travel other avenues. *Murphy* and *Lunsford* articulate both sides of the split admirably and there's no need for further amplification here, only resolution somewhere.").

C. The Government's Defense Of The Decision Below Is Unpersuasive.

On the merits, the government's argument provides no reason to deny review in light of the entrenched conflict. The argument is also unconvincing for four reasons.

1. The government contends that a sex offender's obligation to update a registration is triggered when the sex offender "abandons" a residence. BIO 9. But a sex offender's obligation to update a registration is triggered only "after" a change in "residence," and the obligation arises only where the defendant "resides." 42 U.S.C. § 16913(a), (c). Congress defined "resides" to mean "the location of the individual's home or other place where the individual habitually lives." 42 U.S.C. § 16911(13). The clear import of this statutory language is that a sex offender who moves from one jurisdiction to another is not obligated to inform the former jurisdiction of the change, as the sex offender no longer has a home or "habitually lives" in the former jurisdiction. Because he no longer "resides" in that jurisdiction, he has no obligation to update his registration in that jurisdiction. Instead, the offender has an obligation

to update his registration in the arriving jurisdiction unless that jurisdiction is beyond SORNA's reach (as it is here).

The government's suggestion that a sex offender can update a registration *prior to* a change in residence is inconsistent with the statutory scheme. BIO 9. Congress used the present tense "resides," as the "jurisdiction involved," 42 U.S.C. § 16913(a), (c), and, again, it defined "resides" as the "location of the offender's home or other place where the individual habitually lives," 42 U.S.C. § 16911(13). Prior to a change in residence, "the location of the individual's home" is not the yet-to-be-lived-in home; it is the home where the offender currently resides. Because the offender does not change this residence until after he moves, it makes no sense to refer to the future home as "the individual's home," nor does it make sense to suggest that the offender "habitually lives" in a home he has not yet lived in. There is simply nothing in SORNA that requires an offender to inform a jurisdiction "in advance of his travel that he [is] abandoning his [] residence." BIO 10. That "conditional obligation" is not found within the text of SORNA's registration requirements.

2. The government suggests that our position upsets Congress's stated goal of a uniform sex offender registration system. BIO 10. Initially, this is odd criticism from a party who urges this Court to let stand a conflict that makes impossible a uniform sex offender registration system. If the government were truly worried about uniformity, it would ask this Court to grant the petition to resolve the conflict.

In any event, the government's argument lacks merit. If a sex offender moves from one SORNA jurisdiction to another, the goal of uniformity is met because the offender

must update the registration in the new jurisdiction, which must then share that information with other jurisdictions. 42 U.S.C. § 16913(c); Office of the Attorney General; *The National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38,030-1, at 38,066 (July 2, 2008). If the sex offender moves from a SORNA jurisdiction to a non-SORNA jurisdiction, as happened in this case, that offender is beyond the reach of Congress and SORNA's registration system. It is not true that the removal from the registration system of each offender who moves to a foreign country upsets principles of uniformity or comprehensiveness. SORNA is still applied uniformly, and it still comprehensively includes all sex offenders within SORNA jurisdictions. *See* 42 U.S.C. § 16928 (requiring registration of any sex offender entering a SORNA jurisdiction from a non-SORNA jurisdiction). Moreover, as a policy matter, "when a sex offender leaves the country, he no longer poses an immediate threat to the safety of children in the United States." *Lunsford*, 725 F.3d at 863.

3. The government further relies on its own Guidelines for interpreting and implementing SORNA. BIO 10-11. The Guidelines, however, were not promulgated to provide notice to sex offenders on how to comply with SORNA, but rather to "provide guidance and assistance to the states and other jurisdictions in incorporating the SORNA requirements into their sex offender registration and notification programs." 73 Fed. Reg. at 38,030. Thus, the Guidelines would not have provided notice to Mr. Nichols of any obligation to inform Kansas of his travel plans.

Moreover, the government makes no effort to square the Guidelines with the applicable statutes. Nor do the Guidelines cited by the government make any serious

attempt to implement the directives found in § 16913. As the Eighth Circuit found in rejecting a similar argument, "the National Guidelines [do not] grapple effectively with the language of the statute on this point." *Lunsford*, 725 F.3d at 861.

The government also suggests that it will publish additional regulations "consistent with the decision below." BIO 12 n.2. But again, any regulation consistent with the Tenth Circuit's interpretation of SORNA would conflict with the applicable statutory language. *Lunsford*, 725 F.3d at 861.[3]

4. Finally, the government contends that its interpretation is not inconsistent with this Court's decision in *Carr v. United States*, 560 U.S. 438 (2010), because the "conditional obligation" to register becomes "complete only when the three-business-day deadline had elapsed." BIO 12. But this position is contrary to the government's claim that the obligation to update a registration arises when a residence is abandoned. If abandonment is the "change in residence," there is no requirement that the defendant actually change residences or travel in interstate commerce prior to the failure to update within three days of the change in residence (for instance, if the offender relocates or travels on the fourth day after abandoning his residence).

In the end, the circuits are split on the merits, and the Tenth Circuit's position is the weaker one. Review is necessary.

[3] Moreover, the additional regulations would do nothing to resolve the conflict between the Eighth and Tenth Circuits, as the Eighth Circuit has already rejected the government's reliance on regulations that conflict with the statutory text. *Lunsford*, 725 F.3d at 861.

II. Review Is Necessary To Determine Whether Congress's Delegation To The Attorney General To Determine Whether SORNA Applies to Pre-Enactment Sex Offenders Violates The Non-Delegation Doctrine.

The government opposes review of the non-delegation doctrine issue because no conflict exists in the lower courts. BIO 16. If this were a sufficient reason to deny review, decisions like *Alleyne v. United States*, 133 S.Ct. 2151 (2013), and *Johnson v. United States*, 135 S.Ct. 2551 (2015), would not exist. But there are certain, fundamental issues that deserve this Court's attention. Whether Congress can task the country's top prosecutor with the authority to extend a criminal provision to thousands of people, then prosecute those people for violations of the provision, is one such fundamental issue. In dissent in *Reynolds v. United States*, 132 S.Ct. 975, 978 (2012), Justice Scalia (joined by Justice Ginsburg) flagged the issue for potential review, and Judge Gorsuch below urged this Court to review the issue in this case, Pet. App. 29-49.

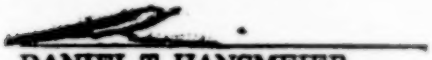
Moreover, in opposing review, the government does not acknowledge the uncertainty within this Court's precedent on whether a delegation involving the reach of a criminal statute requires more constraint than a non-criminal delegation. BIO 17-18. This issue was preserved below. This case is an excellent vehicle for this Court to bring clarity to this important issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MELODY BRANNON
Federal Public Defender



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September 25, 2015

No. 15-5238

Supreme Court, U.S.
FILED
DEC 23 2015
OFFICE OF THE CLERK

In The Supreme Court of the United States

LESTER RAY NICHOLS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX

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Petition For Writ of Certiorari Filed July 14, 2015
Certiorari Granted November 6, 2015

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TABLE OF CONTENTS

Page

Relevant docket entries, *United States v. Nichols*, Case No. 6:13-CR-10106-JTM-1 (D. Kansas) 1

Relevant docket entries, *United States v. Nichols*, Case No. 14-3041 (10th Cir.) 6

Indictment, *United States v. Nichols*, Case No. 6:13-CR-10106-JTM-1 (D. Kansas filed June 19, 2013) 11

Motion to Dismiss Indictment, *United States v. Nichols*, Case No. 6:13-CR-10106-JTM-1 (D. Kansas filed October 15, 2013) 13

Response to Motion to Dismiss Indictment, *United States v. Nichols*, Case No. 6:13-CR-10106-JTM-1 (D. Kansas filed October 29, 2013) 20

Transcript of Motions Hearing held on November 4, 2013, *United States v. Nichols*, Case No. 6:13-CR-10106-JTM-1 (D. Kansas filed April 23, 2014) 26

Memorandum and Order denying Motion to Dismiss Indictment, *United States v. Nichols*, Case No. 6:13-CR-10106-JTM-1 (D. Kansas filed November 12, 2013) 54

Petition to enter plea of guilty and order entering plea, *United States v. Nichols*, Case No. 6:13-CR-10106-JTM-1 (D. Kansas filed November 13, 2013) 65

TABLE OF CONTENTS – Continued

Page

Plea Agreement, *United States v. Nichols*, Case No. 6:13-CR-10106-JTM-1 (D. Kansas filed November 13, 2013) 78

Judgment, *United States v. Nichols*, Case No. 6:13-CR-10106-JTM-1 (D. Kansas filed February 13, 2014) 88

Notice of Appeal to Tenth Circuit Court of Appeals, *United States v. Nichols*, Case No. 6:13-CR-10106-JTM-1 (D. Kansas filed February 25, 2014) 101

Amended Judgment, *United States v. Nichols*, Case No. 6:13-CR-10106-JTM-1 (D. Kansas filed July 29, 2014) 103

United States v. Nichols, 775 F.3d 1225 (10th Cir. 2014) 117

United States v. Nichols, 784 F.3d 666 (10th Cir. 2015) 134

Nichols v. United States, 136 S. Ct. 445 (2015) 159

UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS

(WICHITA)

Criminal Docket for Case No. 6:13-cr-10106-JTM-1

UNITED STATES

V.

LESTER RAY NICHOLS

RELEVANT DOCKET ENTRIES

DATE FILED	NUMBER	DOCKET TEXT
6/19/2013	1	INDICTMENT as to Lester Ray Nichols (1) count(s) 1. (aa) (Entered: 06/20/2013)
10/15/2013	13	MOTION to Dismiss Indictment and Brief by Lester Ray Nichols. (Henry, Timothy) (Entered: 10/15/2013)
10/29/2013	17	RESPONSE TO MOTION by USA as to Lester Ray Nichols re 13 MOTION to Dismiss Indictment and Brief (Hart, Jason) (Entered: 10/29/2013)
11/04/2013	18	MINUTE ENTRY for proceedings held before District Judge J. Thomas Marten: MOTION HEARING as to Lester Ray Nichols held on 11/4/2013 re 13 MOTION to Dismiss Indictment and Brief

		filed by Lester Ray Nichols. The court took the matter under advisement. (Court Reporter Jana McKinney.) This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 11/04/2013)
11/12/2013	19	NOTICE OF INTENT TO CHANGE PLEA and NOTICE OF HEARING. The defendant Lester Ray Nichols has notified the court on 11/12/13 that he intends to change his plea. The time from this notice until the change of plea hearing (including any continuances) is excludable time for speedy trial purposes. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) Change of Plea Hearing set for 11/13/2013 at 4:00 PM in Courtroom 238 JTM) before District Judge J. Thomas Marten. (mss) (Entered: 11/12/2013)
11/12/2013	20	MEMORANDUM AND ORDER denying 13 Motion to Dismiss Indictment as to Lester Ray Nichols (1). Signed by District Judge J. Thomas Marten on 11/10/2013. (mss) (Entered: 11/12/2013)

11/13/2013	21	MINUTE ENTRY for proceedings held before District Judge J. Thomas Marten: CHANGE OF PLEA HEARING as to Lester Ray Nichols held on 11/13/2013. Defendant entered a plea of guilty to Count 1 of the Indictment. Sentencing set for 2/3/2014 at 10:00 AM in Courtroom 238 JTM) before District Judge J. Thomas Marten. (Court Reporter Jana McKinney.) This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 11/13/2013)
11/13/2013	23	PETITION TO ENTER PLEA OF GUILTY AND ORDER ENTERING PLEA as to Lester Ray Nichols (1): Count 1. Signed by District Judge J. Thomas Marten on 11/13/2013. (smg) (Entered: 11/15/2013)
11/13/2013	24	PLEA AGREEMENT as to Lester Ray Nichols re 23 Petition and Order to Enter Plea of Guilty. (smg) (Entered: 11/15/2013)
2/12/2014	28	MINUTE ENTRY for proceedings held before District Judge J. Thomas Marten: SENTENCING

		HEARING held on 2/12/2014 as to defendant Lester Ray Nichols. (Court Reporter Jana McKinney.) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 02/12/2014)
2/13/2014	29	JUDGMENT as to Lester Ray Nichols (1): Count 1 = 10 Months Imprisonment; 5 Years Supervised Release; $100 Assessment. Signed by District Judge J. Thomas Marten on 2/13/2014. (aa) (Entered: 02/13/2014)
2/25/2014	31	NOTICE OF APPEAL TO 10CCA as to defendant Lester Ray Nichols re 29 Judgment (Henry, Timothy) (Entered: 02/25/2014)
4/23/2014	38	TRANSCRIPT of Motion Hearing held November 4, 2013 as to Lester Ray Nichols before Judge J. Thomas Marten, Court Reporter Jana McKinney, 316-315-4314, jana_mckinney@ksd.uscourts.gov. Transcript purchased by: Mr. Timothy Henry.
		NOTICE RE REDACTION OF TRANSCRIPTS: Within 7 calendar days of this filing, each party shall inform the

		Court, by filing a Notice of Intent to Redact, of the party's intent to redact personal data identifiers from the electronic transcript of the court proceeding. The policy is located on our website at www.ksd.uscourts.gov. Please read this policy carefully. If no Notice of Intent to Redact is filed within the allotted time, this transcript will be made electronically available on the date set forth below. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Release of Transcript Restriction set for 7/22/2014. (jlh) (Entered: 04/23/2014)
7/29/2014	42	AMENDED JUDGMENT as to Lester Ray Nichols (1), Count(s) 1, AMENDED JUDGMENT: No Change to Sentence. Signed by Chief Judge J. Thomas Marten on 07/29/2014. (aa) (Entered: 07/29/2014)

GENERAL DOCKET

TENTH CIRCUIT COURT OF APPEALS

Court of Appeals Docket # 14-3041

UNITED STATES

V.

LESTER RAY NICHOLS

Appeal From: District of Kansas

Fee Status: In Forma Pauperis

Docketed: 02/26/2014

Termed: 04/23/2015

DATE FILED	NUMBER	DOCKET TEXT
2/26/2014	1	[10152468] Criminal case docketed. Preliminary record filed. DATE RECEIVED: 02/26/2014. Docketing statement, designation of record, transcript order form and notice of appearance due on 03/12/2014 for Lester Ray Nichols; notice of appearance due on 3/12/14 for United States of America. [14-3041]
4/25/2014	12	[10170300] Record on appeal filed. No. of Volumes: 3, Comments: Volume 1: Pleadings. Volume 2: PreSentence Report (SEALED). Volume 3: Transcript. Appellant's brief

		due on 06/04/2014 for Lester Ray Nichols. [14-3041]
7/3/2014	16	[10188638] Appellant/ Petitioner's brief filed by Mr. Lester Ray Nichols. 8 paper copies to be provided to the court. Served on 07/03/2014 by US mail, email. Oral argument requested? Yes. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [14-3041] TJH
8/4/2014	18	[10195947] Appellee/ Respondent's brief filed by United States of America. 7 paper copies to be provided to the court. Served on: 08/04/2014. Manner of service: email. Oral argument requested? Yes. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [14-3041] JAB
8/15/2014	20	[10198926] Appellant/ Petitioner's reply brief filed by Mr. Lester Ray Nichols. 8 paper copies to be provided to the court. Served on 08/15/2014. Manner of Service: email, US mail. This pleading complies with all required (privacy, paper copy and

		virus) certifications: Yes. [14-3041] TJH
11/18/2014	25	[10225233] Case argued by Timothy Henry for Appellant and by James Brown for the Appellee; Submitted to Judges McHugh, McKay and Baldock. [14-3041]
12/19/2014	26	[10225677] Supplemental authority filed by Mr. Lester Ray Nichols. Served on 11/19/2014. Manner of Service: US mail, email. [14-3041] TJH
12/30/2014	27	[10236235] Affirmed; Terminated on the merits after oral hearing; Written, signed, published; Judges McHugh (authoring), McKay (concurring) and Baldock. Mandate to issue. [14-3041]
12/30/2014	28	[10236238] Judgment for opinion filed. [14-3041]
1/13/2015	29	[10239606] Petition for rehearing en banc filed by Mr. Lester Ray Nichols. Original and 18 copies. Served on 01/13/2015. Manner of Service: US mail, email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [14-3041] TJH

1/16/2015	31	[10240477] Order filed by Judges McHugh, McKay and Baldock – Appellee shall file a response to appellant's petition for rehearing and petition for rehearing en banc. Response due on 01/30/2015 for United States of America. Served on 01/16/2015. [14-3041]
1/27/2015	32	[10243141] Response filed by United States of America to Appellant's Petition for Rehearing En Banc. Served on 01/27/2015. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [14-3041] JAB
4/15/2015	33	[10264092] Order filed by Judges Briscoe, Kelly, Lucero (dissenting), Hartz, Tymkovich, Gorsuch (dissenting), Holmes, Matheson, Bacharach, Phillips, McHugh and Moritz. The implicit request for panel rehearing contained in appellant's petition for rehearing en banc is denied by a majority of the original panel members. The petition for rehearing en banc was transmitted to all judges in

		regular active service, a poll was called, and a majority voted to deny the petition. Judges Lucero, Gorsuch, Matheson and Moritz would grant the en banc petition. [14-3041]
4/15/2015	34	[10264094] Published order filed denying petition for rehearing and for rehearing en banc by Judges Briscoe, Kelly, Lucero, Hartz, Tymkovich, Gorsuch, Holmes, Matheson, Bacharach, Phillips, McHugh and Moritz. Please see previous docket entry. [14-3041]
4/23/2015	35	[10266237] Mandate issued. [14-3041]

UNITED STATES DISTRICT COURT

District of Kansas

(Wichita Docket)

UNITED STATES OF AMERICA,

Plaintiff,

v. **CASE NO. 13-10106-01-JTM**

LESTER RAY NICHOLS,

Defendant.

INDICTMENT

(Filed Jun. 19, 2013)

THE GRAND JURY CHARGES:

COUNT ONE

18 U.S.C. § 2250(a)
(FAILURE TO REGISTER)

COUNT 1

On or about November 9, 2012, in the District of Kansas and elsewhere,

LESTER RAY NICHOLS,

the defendant, an individual required to register under the Sex Offender Registration and Notification Act after conviction for Interstate Travel to Engage in Sex with a Minor in United States District Court (Kansas) case number 03CR10127, knowingly failed to register and update a registration as required by the Sex Offender Registration and Notification Act, in

violation of Title 18 United States Code Section 2250(a).

A TRUE BILL

June 19, 2013
DATE

s/Foreperson
FOREPERSON OF THE GRAND JURY

s/Barry R. Grissom
BARRY R. GRISSOM
United States Attorney
District of Kansas
1200 Epic Center, 301 N. Main
Wichita, Kansas 67202
(316) 269-6481
Ks. S. Ct. No. 10866
Barry.Grissom@usdoj.gov

It is requested that the trial be held in Wichita, KS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	Case No. 13-10106-01 JTM
LESTER RAY NICHOLS, Defendant.	)	

MOTION TO DISMISS AND BRIEF

(Filed Oct. 15, 2013)

COMES NOW the defendant, Lester Ray Nichols, by and through his attorney, Timothy J. Henry, Assistant Federal Defender for the District of Kansas, and moves this Court to dismiss the one-count indictment as 1) the facts of this case fail to support an offense that is subject to the SORNA statute as alleged therein, and 2) the discretion statutorily delegated to the Attorney General to declare SORNA applicable to offenders convicted of sex crimes prior to SORNA's enactment date of July 26, 2006, violates the non-delegation doctrine of Article I, § 1 of the United States Constitution. On behalf of this Motion, defense counsel states as follows:

Defendant Nichols is charged in a one-count indictment with knowingly failing to register and update his registration as required by the Sex Offender Registration and Notification Act (SORNA) in

violation of 18 U.S.C. § 2250(a). Nichols underlying sex offense was a federal case cited in the indictment as case # 03 CR 10127. In the first part of this Motion to Dismiss, it is the defense position that such registration is not required when one leaves the specifically defined "jurisdiction" that is subject to this legislation, and now "resides" in a foreign country that is not a "jurisdiction involved" for purposes of SORNA.

The facts pertinent to this motion are not materially in dispute. First, the defendant was under federal supervision in the District of Kansas in 2012, and had complied with both Kansas and federal authorities in keeping his sex offender registry up to date every three months. He last registered in early October, 2012, and was not required to renew that registration until early January, 2013. In early November, 2012, the defendant boarded a plane from Kansas City International Airport to Manila, Philippines. He was ultimately arrested for the present offense on December 26, 2012, at a hotel in Manila by State Department authorities. Nichols was held in custody and then deported by Philippine authorities by plane to Los Angeles, California, where he was taken into custody by the U.S. Marshal Service and transported to Kansas to face the present charge.

The first element of 18 U.S.C. § 2250(a) states, "Whoever – (1) is required to register under the Sex Offender Registration and Notification Act; . . . " Chapter 151 of Title 42 then defines what these terms mean. *See* 42 U.S.C. § 16911 *et seq.* Section 16913 is

entitled "Registry requirements for sex offenders." It states:

> **(a) In general**
>
> A sex offender shall register, and keep the registration current, **in each jurisdiction where the offender resides**, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

42 U.S.C. § 16913(a).

The term "jurisdiction" is specifically defined in 42 U.S.C. § 16911(10):

> The term "jurisdiction" means any of the following:
>
> **(A)** A State.
>
> **(B)** The District of Columbia.
>
> **(C)** The Commonwealth of Puerto Rico.
>
> **(D)** Guam.
>
> **(E)** American Samoa.
>
> **(F)** The Northern Mariana Islands.
>
> **(G)** The United States Virgin Islands.

> **(H)** To the extent provided and subject to the requirements of section 16927 of this title, a federally recognized Indian tribe.

42 U.S.C. § 16911(10).

"The term 'resides' means, with respect to an individual, the location of the individuals home or other place where the individual habitually lives." 42 U.S.C. § 16911(13).

Finally, pertinent to this motion, 42 U.S.C. § 16928 states:

> The Attorney General, in consultation with the Secretary of State and the Secretary of Homeland Security, shall establish and maintain a system for informing the relevant jurisdictions about persons entering the United States who are required to register under this subchapter. The Secretary of State and the Secretary of Homeland Security shall provide such information and carry out such functions as the Attorney General may direct in the operation of the system.

42 U.S.C. § 16928.

The Tenth Circuit addressed this issue in *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011). First, it acknowledged that "SORNA defines 'jurisdiction' to include U.S. states and territories but not foreign nations." 664 F.3d at 800, citing § 16911(10). It then went on to hold that one's "residence" and where one "resides" "are *two different concepts*." *Id.* at 800 (emphasis by Court). Defense counsel respectfully

disagrees and adopts the reasoning in the dissenting opinion in *Murphy*, as well as that contained in the Eighth Circuit's recent decision in *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013).

The Tenth Circuit's majority decision may carry the day with this Court, but it clearly does not carry its legal water. The term "resides" is specifically defined in the statute, yet abandoned by the majority in *Murphy*. *See*, 664 F.3d at 806 (J. Lucero, dissenting). Canons of statutory construction require we use the definition specifically defined by Congress where it is given. *Id.* quoting *Hackwell v. United States*, 491 F.3d 1229, 1240 (10th Cir. 2007).

Moreover, "resides" as defined at 42 U.S.C. § 16911(13) and used in 42 U.S.C. § 16913(a) is in the present tense. The term being selectively defined is not "resided" but "resides." When, as here and in *Murphy* and *Lunsford*, a person abandons his residence, turns in his keys and informs his landlord he is terminating his lease, and moves to a foreign country, he no longer has "residence" in a "jurisdiction involved." "Resides" is "the location of the individual's home or other place where the individual habitually lives." 42 U.S.C. § 16911(13). Here, Mr. Nichols flew to the Philippines without any intent to return. In other words, Kansas was no longer a "jurisdiction involved" requiring updating this change of residence, because "jurisdiction" is where the offender "resides." Kansas was no longer where Mr. Nichols resides.

Finally, Congress saw fit to include a separate statute that requires the Attorney General to "establish and maintain a system for informing the relevant jurisdictions about persons entering the United States who are required to register under this subchapter[,]" *See* 42 U.S.C. § 16928. Thus, Congress was aware that it was not exercising it's [sic] extraterritorial jurisdiction when implementing SORNA. The Eighth Circuit recognized this.

> But Congress did not give SORNA extraterritorial effect, *see* 42 U.S.C. § 16911(10), and when a sex offender leaves the country, he no longer poses an immediate threat to the safety of children in the United States. The government asserts no policy interest under SORNA in monitoring the offender's subsequent movements *among* foreign jurisdictions. *See* National Guidelines, 73 Fed. Reg. At 38,066 ("A sex offender who moves to a foreign country may pass beyond the reach of U.S. jurisdictions and hence may not be subject to any enforceable registration requirement under U.S. law unless and until he or she returns to the United States.").

Lunsford, 725 F.3d at 863 (emphasis by Court).

* * *

Respectfully submitted,

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[Certificate Of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	**Case No. 13-10106-01-JTM**
VS.	)	
LESTER RAY NICHOLS,	)	
Defendant.	)	

UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO DISMISS (DOC. 13)

(Filed Oct. 29, 2013)

The defendant's Motion to Dismiss advances two separate arguments. For his first argument, the defendant contends that the court should ignore controlling 10th Circuit precedent. For his second argument, the defendant requests the Court accept an argument that has been rejected by every circuit that has considered it. The United States submits that the Court should deny the defendant's motion.

FACTS

The Government does not dispute the defendant's recitation of facts, as set forth in the third paragraph of his motion (Doc. 13). The Government would add that the defendant purchased a round trip ticket. For his out-bound air-travel, the defendant flew from

Kansas City, Missouri (MCI) to Detroit, Michigan (DTW) on November 9, 2012. The defendant had an approximately 2 hour layover in Detroit before flying on to Manila, Phillipines (MNL), with a schedule arrival time of 12:05am on November 11, 2012. The defendant's scheduled return ticket was for December 13, 2012, with travel through New York City (JFK) to a final destination of Kansas City, Missouri.

The defendant's argument is contrary to prevailing 10th Circuit precedent

For his first argument, the defendant acknowledges that he is advancing an argument that is contrary to prevailing 10th Circuit law, specifically *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011). In *Murphy*, the Tenth Circuit was presented with an appeal from a SORNA offender who claimed he could not be prosecuted in Utah for failing to update his registration in Utah after he left the state and moved to a foreign jurisdiction (Belize). *Id.* Briefly stated, the defendant asserted he had no obligation to update his registration after he left the state, because he no longer resided in a covered jurisdiction. *Id.* at 800. In affirming the defendant's conviction, the Tenth Circuit explained:

> "First, the statutory language naturally supports the conclusion that **abandoning one's living place constitutes a change in residence under SORNA**. When someone changes residences – whether by leaving his home, moving into a new dwelling, becoming

> homeless, or other means – he has a reporting obligation."

Id. at 801.

> "The permanent abandonment of an abode constitutes a change of residence, regardless of whether a new residence has been formally adopted. Moreover, this statutory construction aligns with legislative intent, because Congress's goal in enacting SORNA was to ensure that sex offenders could not avoid registration requirements by moving out of state."

Id. at 802-03.

> "A second conclusion also follows from the statutory language. **When an offender leaves a residence in a state, and then leaves the state entirely, that state remains a jurisdiction involved. Even if a sex offender plans on leaving a state permanently, his reporting obligation to a jurisdiction involved remains.** Put differently, because the issue of identifying a jurisdiction involved is a different determination than the issue of whether a reporting obligation has arisen, the intentional abandonment of a home does not in itself change the 'jurisdiction where the offender resides,' so long as the offender was still a resident of the state when the abandonment occurred."

Id. at 803.

> "The third conclusion flowing from SORNA is that a reporting obligation does not disappear simply because an individual manages to relocate to a non-SORNA jurisdiction before the three-day deadline for updating a registration has passed. Needless to say, a legal obligation under federal law does not expire simply because one has managed to leave the country before the date on which noncompliance is punishable. So even though SORNA grants a three-day grace period, **the obligation to update a registration attaches to the sex offender as soon as a change in status occurs**."

Id.

In this case, the defendant makes no attempt to distinguish the *Murphy* case from the present case. Indeed, no distinction exists. The defendant nevertheless asserts that the 10th Circuit's decision in *Murphy* "does not carry its legal water." In so doing, he makes a syntactical argument regarding the term "resides." The defendant attempts to hijack the entire statutory scheme of SORNA by claiming the use of the present tense for the term "resides" means that, once the defendant no longer "resides" in Kansas in the present tense, his obligation was over and Kansas is no longer a "jurisdiction involved", as that phrase appears in the statutes.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall

statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). "The most fundamental guide to statutory construction is common sense." *Salt Lake City v. Western Area Power Admin.*, 926 F.2d 974, 984 (10th Cir.1991). The Government contends that the reading given by the *Murphy* court places the word "resides" in its proper context and in its proper place in the overall statutory scheme. As noted by the *Murphy* court, "Most fundamentally, it is important to understand that a 'jurisdiction where the offender resides' and a 'residence' are two different concepts. Identifying a jurisdiction involved implicates a different inquiry than deciding whether a reporting obligation has arisen." 664 F.3d 798, 800 (10th Cir. 2011).

Indeed, the term "resides" is actually limited to "with respect to an individual" rather than "with respect to a jurisdiction" or "with respect to a jurisdiction involved." See 42 U.S.C. 16911(13). The defendant seeks to apply the definition more broadly than the definition itself would allow. Moreover, the fact that the definition of "resides" includes reference to "where the individual habitually lives" necessarily involves consideration of the historical (past tense) context of a sex offender's whereabouts, even though the word "lives" is in the present tense. Again, as noted in the *Davis* and *Western Area Power Admin.* cases, context and common sense should guide the Court.

* * *

Respectfully submitted,

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s/Jason W. Hart

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[Certificate Of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

THE UNITED STATES
OF AMERICA,

Plaintiff,

vs.

LESTER RAY NICHOLS,

Defendant.

District Court
Case Number
13-10106-01-JTM

TRANSCRIPT OF PROCEEDINGS

(Filed Apr. 23, 2014)

On the 4th day of November, 2013 at 10:03 a.m. came on to be heard in the MOTION TO DISMISS in the above-entitled and numbered cause before the HONORABLE J. THOMAS MARTEN, Judge of the United States District Court for the District of Kansas, Sitting in Wichita.

Proceedings recorded by mechanical stenography.

Transcript produced by computer.

APPEARANCES

The Plaintiff appeared by and through:
Mr. Jason Hart
Assistant United States Attorney
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The Defendant appeared in person, by and through:
Mr. Timothy Henry
Assistant Federal Public Defender
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INDEX

Argument by Mr. Henry	4
Argument by Mr. Hart	25
Reporter's Certificate	33

[3] THE COURT: Good morning. This is the United States District Court for the District of Kansas, Case Number 13-10106-01, United States of America versus Lester Ray Nichols.

You can keep your seats, but if you would note your appearances, please.

MR. HART: Thank you, Your Honor. The government appears by and through Jason Hart, Assistant United States Attorney.

THE COURT: Thank you, Mr. Hart.

MR. HENRY: Defendant appears in person, through counsel, Timothy Henry, Assistant Federal Defender.

THE COURT: Thank you, Mr. Henry.

Well, this matter originally was set up to – for the purpose of hearing a couple of motions: One to dismiss, and one to suppress.

I understand that there, apparently, are materials or other evidence that are still in the Philippines and not available to us as a result of time differences and perhaps some other issues today and the parties are willing to put off the suppression motion until shortly before the trial begins.

Is that correct, Mr. Hart?

MR. HART: That is correct, Your Honor.

[4] THE COURT: Mr. Henry?

MR. HENRY: Yes, Your Honor, that is correct.

THE COURT: So, what we're dealing with here today then is the motion to dismiss. The gist of the argument being that the Sex Offender Registration and Notification Act does not apply to Mr. Nichols under the circumstances of this case. My understanding is that because he lives in the Philippines, apparently, resides there, that he was not required to update his registration information here in the United States, and there are several grounds which have been asserted in support of that motion.

The only thing I would say at the outset is that you are facing, Mr. Henry, on behalf of Mr. Nichols, an uphill climb in that regard given the state of authority which I have reviewed but I am here to

hear argument in behalf of your position, so with that, you may proceed, Mr. Henry.

MR. HENRY: Thank you, Your Honor.

And as the government's motion in response to my motion to dismiss acknowledged, a lot of the facts here are not being – are not in dispute. The government did point out that the plane ticket itinerary that was applicable here was a situation where my client, I believe the evidence is, is that on [5] the day that he flies out, or the day before, something like that, he abandons his residence in Kansas, drops off the key to his apartment to the landlord and goes to KCI (sic), flies out through Detroit, and then arrives in Manila, so there is approximately probably something like 20 hours total on the flight. He gets to Manila, and that is not a jurisdiction that is listed in the statute, the SORNA statute of a jurisdiction involved.

I would also point out that – and the government brings this in their response, is that the return flight on this roundtrip ticket was supposed to have occurred on December 13th of 2013 and or December 12th and, obviously, my client is still in Manila on the 26th of December and is arrested and, therefore, I would submit that there was never – there was an abandonment of his apartment; no intent to return.

The – but he had been registered for the three-month incremental period that Kansas requires. They require every three months. In early October he had reregistered for and was required to reregister with the state until early in January and, again, then

there is this three-day window when somebody changes residences that they're – under Kansas law, I think that is essentially the SORNA three-day period that the [6] government references, is that that three-day period, obviously, had not expired by the time he hit the – the Manila airport in the Philippines.

The – so the issue I think is, is there a reporting obligation when somebody goes and intends to live outside the U.S. jurisdiction, and the jurisdictions that are listed in Section 1691 – excuse me, 16911 of Title 42. And it – it wasn't brought up in the *Murphy* case and it wasn't brought up in the – the – I want to say *Lunsford* case from the Eight Circuit but the – there is a later statute in – and, again, the government argues the – the Canon of Statutory Construction regarding reading these statutes in context in their entirety and yet in their entirety, we see at 42 U.S.C. Section 16928 a separate statute within the SORNA law that says that when somebody does go outside the U.S. jurisdictions, there is to be put in place by the Department of Justice a notification system for when they come back in.

And it is clear from, I would submit from *Murphy*, as well as the Eighth Circuit's case, that Congress chose not to exercise their extraterritorial jurisdictional powers. If they have jurisdiction beyond our borders, they chose not to do that and they specifically had a statute to set up a system in place [7] for when they do come back in to our jurisdiction. And that was never raised in those earlier cases but I think the – and, again, I – I implore the Court when

the government says that – that, you know, Canons of Statutory Construction show what is – or ask the Court to, um, to abide by what was the intent of Congress, well, I am convinced that the – what Congress set forth was a fairly clear definition of "resides" and the Philippines would not be included in that definition because it's not a jurisdiction that is permitted under the statute.

And what I found interesting is, is that it really is the majority's decision or the majority's position in *Murphy*, because *Murphy* did have a dissent, it seems like the majority's opinion really goes out of the way, I mean, they – they have to jump through a lot of hoops to try to make their arguments sell. And, again, I can understand that, that this is a law that, you know, defendants are not particularly looked at kindly and but what we have is, and I think it was Judge Tymkovich, really went out of his way to make – to split hairs to say that, well, "resides" and "residence" are two different terms and, therefore, we can go ahead and apply two different definitions to them and I would submit that the clear and the shorter [8] and crisper argument here is what the dissent said, and what the Eighth Circuit said, is that just look at the clear language of the statute, and – and that's what Kansas statutory construction asked us to do. When Congress specifically defines something, you don't go outside of the statute to try to give it a different definition, and – and that's what we have here.

We have the majority in *Murphy* really closing up a huge loophole in the statute but courts are not

supposed to legislate. Courts are supposed to interpret, and – and in doing so, it really took a, you know, quite a bit of legal gymnastics to get to that position where "resides" and "residence" don't mean the same thing and it's clear that in *Murphy* they talk about how, um, abandonment of a residence – and let me get to that quote – the government cited it, but – the permanent abandonment of an abode constitutes a change of residence regardless of whether a new residence has been formally adopted.

And what we have is that if SORNA applies to where you reside at, that is where somebody resides, and this is defined by the statute as well in 16911(13), that it is – and if abandonment of a residence is a – constitutes a change in residence, then when you are saying that this SORNA statute [9] applies to where you are presently residing at, then we're talking about the Philippines, and when that same statute three subsections earlier at Subsection (10) says, these are the jurisdictions that are covered by SORNA, and SORNA applies in the present tense and once there is an abandonment, you don't get to reach back, say historically it is also where you previously resided, it is where you are residing now, and that is why there is this extra statute layer on in SORNA that says, And when you come back in, there will be a system in place so we can put you back on the registry.

And I am just trying to think how legitimately does the U.S. Government, that is the Department of Justice, how do they legitimately exercise their

jurisdiction in foreign countries regarding this registration? And it is clear Congress intended that they didn't want to have to try to keep track of people all over the country, just keep track of people within our own country and when they come back in, we'll get them back on and we'll start watching over them.

I kind of analogize it to what the probation department or what the sentencing commission did with respect to recommending supervised release not being imposed on illegal reentry clients because they get deported. We don't want to have probation officers [10] supervising people in Mexico, or Canada, or some other foreign country because that's just wasting their resources and our governmental resources.

And I – this may be a very slanted viewpoint of how SORNA works, Your Honor, but maybe Congress when they put in that last – one of those last statutes regarding having a system set up when they come back in the country, maybe they were – there was a certain amount of encouragement that, let them fly the coop; we don't want these type of defendants in our country. If they come back in, we'll put them back on the rolls again.

But – but I think that we can't be supervising people going to Indonesia, and India, and, you know, the Antarctica, or Argentina. We just don't have those resources to try to track and keep track of everybody but when they come back in through our immigration system, we know when these people are coming back in, so we can keep a registration and then there is a

statute that the Department of Justice was to set up a system to flag these people when they come back in.

Once he's in the Philippines, the government has lost jurisdiction of him with respect to SORNA. And it would seem that in applying statutory [11] construction juris prudence, that the statute is more clearly interpreted as what is federal jurisdiction, and the Philippines aren't included in that list, and there is a list of about ten different places that fall within our federal jurisdiction and, secondly, why even have this other statute that says that we're to put in place a system that will put them back on the rolls when they come back in?

And, so, I would argue that this is the government that is making the – stretching, essentially, statutory construction to fit their position, but to go outside of the statute that Congress has specifically defined what "resides" is, and or "residence" and also what jurisdictions, they are the ones that are violating the Canons of Statutory Construction.

As far as the – the second issue that I have raised – do you want me to address them one at a time?

Do you want me to sit down now or keep going?

THE COURT: No, go right ahead, Mr. Henry.

MR. HENRY: The – the Nondelegation Doctrine may be a little bit tougher to overcome because of the circuits that have already decided this

issue where the Tenth Circuit has pretty much said it's just dicta in one of their more recent cases from previous re – they [12] essentially had to explain away one of their previous cases that seem to indicate that I was on the wrong side of this argument but they said, well, that was just dicta because we never had to reach that issue and, therefore, it has not been fully decided, except in the plain error context of the case that I cited in my motion.

But what I found in – in looking through the – the research and the government's response is, is that in the past – and of course one of the – of the major cases that did not fall in favor of using a Nondelegation Doctrine to overturn the – in *Mistretta*, the sentencing commission, the delegation by Congress to set up this quasi legislative independent body to oversee the Sentencing Reform Act and the uniformity that was intended by that act, and – and – and I think that the court may look at that and say, Well, you know, that's – that's similar to, say, Congress setting up some kind of system to try to bring uniformity to sex offender registration but what we have is, is that, I mean, sentencing courts still sentenced even with the sentencing commission guidelines and the – the – and in what we have here is a delegation not to a quasi legislative body that was, you know, set up by Congress, we have delegation [13] of SORNA to the Department of Justice.

Essentially, legislative branch isn't setting up some independent body, they're giving it directly to the executive branch and what seems to me is that

this is not as much an administrative delegation to HHS, or the government's cited the SEC regarding voting within a corporation, you know, the voting power distribution among shareholders, or the FCC overseeing licensing and broadcasters, we are talking about giving the Department of Justice the ability to decide who gets prosecuted by this law.

And so this is – this is not as much a – a – I think – because I think Congress does delegate implementation of their laws to numerous agencies with underneath the executive branch but what the – what is different here is that you are turning an administrative law regarding sex offender registration, and if it was just limited to the administrative part of registering these individuals, that doesn't effect ex post facto, and the Supreme Court has said that, then that's – that's one thing but what we have here is you have a delegation to the Department of Justice that is giving essentially criminal prosecuting authority, who gets to be prosecuted by this – this law if this administrative [14] law is violated, so whether or not we are dealing with ex post facto issues in an administrative context, I think that it is not a necessarily constitutional violation.

But when you have the delegation of when it applies criminally to people, when does SORNA apply, and – and that delegation essentially is not an administrative delegation, as in the legislature giving the Sentencing Reform Act some – some interpretation by an independent body, you're essentially giving the head prosecutor in the executive branch, the law –

the head of the law enforcement branch, the ability to decide when criminal prosecutions are going to be implemented and in that respect –

THE COURT: May I – how is that really any different from every decision when information is brought forward to a prosecutor, the prosecutor deciding, well, we're going to pursue this case or we're not going to?

I mean, I recognize what you are saying but when you cut everything else away and eliminate titles and so forth, how is it any different saying to the Attorney General, you know, you're going to decide who's going to be prosecuted under this law, than Congress passing a law and saying to the U.S. [15] Attorneys, okay, here's what the law is, now you decide whether you are going to prosecute these people or not.

When you cut everything else away, isn't that a matter of discretion with respect to the prosecutors? And, you know, that is wholly apart from the fact that it really does appear that this argument is dead in the water, according to most courts, and I recognize what you said the Tenth Circuit has said and I recognize, you know, that Scalia's statement, you know, can be pulled out and saying, you know, We're getting very close to – but how is it any different from any other kind of prosecutorial discretion? Or the Attorney General coming out with guidelines saying, We're not going to prosecute these kinds of cases?

How is it any different from the lawsuit that was brought some years ago after Congress passed the law to overturn *Miranda* and the justice department saying, we're – we're simply not going to do that? Ultimately, a suit was brought and of course the whole thing was decided on a completely different ground, but help me out here.

MR. HENRY: Well, and I – I kind of anticipated this because I do know that I have an uphill – more of an uphill battle on the second part of this motion. But I think –

[16] THE COURT: Well, I don't know, I think *Murphy* actually, notwithstanding the crack that you see in it, is pretty definitive in terms of –

MR. HENRY: But if you rule in my favor on *Murphy* then it's bound to be heard on bunk [sic], Your Honor, and we can get a definitive decision maybe.

THE COURT: Well, maybe so.

You mean you don't think a three judge decision, which binds me, by the way, it may not bind anybody else outside of our district just like the Eighth Circuit decision is good, persuasive authority for the Tenth Circuit to give to them, but I can't follow any Eighth Circuit case, when the Tenth has one that flies in the face.

MR. HENRY: And I understand the Court has to follow *Murphy* but it was a two to one decision and so there is some dissent even on the Tenth Circuit, I think.

THE COURT: Yeah.

MR. HENRY: But the – as far as the prosecutorial discretion, I think that what's happened – I mean, it's a – I think that these are apples and oranges, Your Honor, and – and let me just try to explain this.

Is that Congress would pass a law and the [17] Department of Justice, because of, say, for example, in *Lopez*, Congress went back in and put in all these, you know, statistical findings to try to keep 922(o), I think it is on the books, as far as the possession of a gun within a school zone district. But, you know, it doesn't get prosecuted because essentially Congress has said that statute is unconstitutional.

In the – I think in, for example, if certain laws are – are chosen not to be enforced more than, say, others, that is a – a kind of a – I would say the line prosecutor or even the Department of Justice telling the line prosecutors, you know, we need to put our efforts elsewhere, we only have a certain amount of limited resources here, so it is more of a ground up, more of a grassroots decision in prosecutorial discretion.

What – what we have here is almost a top down delegation of authority. It's not a – the – what I think we traditionally understand or at least I do as a – as a public defender traditionally understand is the use of prosecutorial discretion, I think what we have is essentially from Congress giving another branch the authority to decide in a macro sense, not in a micro

sense on a case by case level, or but in a macro sense, essentially, the power to decide where this is [18] to go and who it is to apply to.

I do believe that Congress thought that they were sailing too close to the wind with – or to the sail with respect to this is probably or could possibly be an ex post facto violation if we applied it to everybody. We're going to go ahead and just delegate it to the Department of Justice because they are the lawyers that do the criminal prosecutions, they should know what this is and, therefore, we're just going to go ahead and leave it up to the Department of Justice to – to, you know, figure out how to get around the ex post facto clause.

And so – so Congress I think did delegate something that is much larger from a top down, macro type of delegation than the individual decision of who to prosecute and who not to, based upon what we traditionally understand is prosecutorial discretion, so I do think that this statute does fly too close to the sail as Justice Scalia mentioned, but I understand that – that it's not a violation of ex post facto regarding the – the administrative legislative desire to bring uniformity to registration, okay, but I think that when you decide, you know, that, I mean that's – that's the administrative or the – the – the reason why this – this statute is [19] set up, but when you essentially say when it comes to criminal prosecutions who gets enforced against, then you have delegated, essentially, an end around what I think is a violation of ex post facto on the criminal side.

So I understand overall that the – the SORNA is – is as far as the registration requirements but when you give to the Department of Justice the ability to say who this law gets to apply to and who it doesn't in the fashion that Congress did, I think they've – they've overstepped that bound and maybe – I know that the use of this clause is very rare but this might be the – the – the one that is, um, the one example where actually they did violate it.

So, I would just rest then on the rest of my briefs.

I'll be glad to take any questions, Your Honor.

THE COURT: Well, Mr. Henry, you know, you keep talking about an ex post facto effect and typically as one thinks about that it is a law that makes a violation of something that was not and how are you finding an ex post facto violation here?

I mean, at the time that Mr. Nichols went in – what was that? Early 2000s, like 2003 or '04? [20] He was released in 2012. This law was in place at that time.

And are you claiming that by trying to extend it to the Philippines, that that is an ex post facto use of the statute?

MR. HENRY: The ex post facto – it goes to the second part of my motion to dismiss regarding the Nondelegation Doctrine.

As far as the Philippines goes, I think that is the jurisdictional statutory construction argument that I made in the first part.

The – the – as far as the ex post facto argument goes, I know that in the '90s we had different laws, the Jacob Wetterling law and some other laws, but as far as the present registration law that my client is being charged with under SORNA, SORNA wasn't in effect when he picked up his underlying predicate and so the – and what the –

THE COURT: Well, I think that was also true with *Hendricks* and some of the other people who were civilly committed for some period of time when they come out, if I'm remembering correct.

And I may be not, Mr. Henry.

MR. HENRY: And I may not be because *Hendricks* was the State of Kansas law –

[21] THE COURT: Yeah.

MR. HENRY: – that went to the Supreme Court, Mr. Weilert argued it and from here in Wichita and –

THE COURT: It's the one that allows people who are violent sex offenders or whatever to remain civilly committed for an indeterminate period of time.

MR. HENRY: And – and as a defense counsel, I am always concerned, even if you call it

civil, if you are keeping somebody incarcerated, it's very difficult to have that split –

THE COURT: You're not going to get any quarrel from me about that, but it's the principle that you can enact a civil commitment law that applies to people who are already in the penitentiary.

MR. HENRY: And I thought *Hendricks* was more on a due process of how you – what protections are there before you give somebody a lifetime civil commitment and maybe I – then maybe there was this ex post facto argument of *Hendricks* as well that I'm missing, and I apologize.

THE COURT: Well, I'm not sure that there was one but I think it was just assumed that – I know there was argument that how can you lock somebody up again after they've already served their time for an indeterminate period of time, which to me is kind of [22] the essence of an ex post facto effect of a statute, so all I'm wondering is how is this any different?

MR. HENRY: Well, I think the argument that might be made by criminal defense lawyer based upon the statement that you just gave is that, well, I've already been criminally charged, I've already been convicted, and I've already served my time, it is double jeopardy to send me back to prison for possibly the rest of my life. Or what is the procedure? What is the burden of proof? It should be by beyond a reasonable doubt. If you are going to put me back in jail for

the rest of my life in a civil commitment, what is that burden of proof?

And I think those were kind of the touchstones of Hendricks but the – because it was more of a process going forward, they actually had a hearing, I think Jay Greeno is the one who actually did the – did the re – the re – represented Mr. Hendricks or did the hearing that flowed out of that as far as, you know, what is the burden of proof, what rights do you have, and what is – what does a court have to find.

But, and again, I – I don't want to – I mean, I think the Court understands the issue and I am – I know that the circuits that have actually answered it on the – on the ex post facto [23] nondelegation ground have – have ruled against me but it – it is a, um, I think it is when it comes down to it, is that we have this predicate, we have a number of people that have been previously found to be sex offenders, however that definition is defined.

Congress then gives to the Department of Justice, well, you go ahead and determine whether this effects, you know, what type of offenses or how far it goes back, does it effect everyone who is on the books before the law was enacted and they just in some respects took that discretion and said it applies to everybody. Even before that.

And it just seems that when it comes to the criminal prosecution side of this, rather than the administrative regulatory side of it, it – it does seem to kind of cross that – that part that is – that there

are I think more protections in respect to a criminal prosecution versus the civil finding in *Hendricks* or that we have now under the sexually dangerous person definition in the federal system.

THE COURT: Mr. Henry, one last thing. It appears to me in looking at the definition of "jurisdiction" each of these places that are listed are either states or territories over which the United States has some kind of territorial jurisdiction or [24] whatever and to the extent that, for example, in *Murphy* I think it was Belize, wasn't it?

MR. HENRY: Yes.

THE COURT: Where a person went?

And the court I think pretty well answered the question there, although I'm going to take another look at it, obviously, but you're saying that any country in which the U.S. apparently has no territorial interest or is a state, or the District of Columbia, of course, is subject to this same interpretation that you're urging here?

MR. HENRY: Yes. I believe that Congress limited where the statute was to go.

They set up a separate statute in 16928 that says that when you come back in, we'll put you back on the rolls.

THE COURT: Well, you know, it really doesn't say when you come back in.

MR. HENRY: Well –

THE COURT: It says anyone who enters.

MR. HENRY: It looks like it's directing the Attorney General to establish and maintain a system of informing the relevant jurisdictions, that being the U.S. federal jurisdiction, about when people are entering the United States who are required to [25] register.

So I – that seemed to be that – that when you – when I look at the whole SORNA statute in context, in – in its entirety, that there is a system in place where they are – there – the registration requirements apply to those people that are in the federal jurisdictions, whether it's the Virgin Islands, Samolia, District of Columbia, Puerto Rico, or any state, and then when they are outside of there, when those ex pats come into the country we'll get them back on and, again, Canons of Statutory Construction are to imply the definitions that Congress specifically set out and that's where I think *Murphy* is – majority is in err, and I will greatly argue that, if I am given the opportunity.

THE COURT: Is – is there anything in the legislative history that would indicate that that's what Congress had intended or is this what you're divining from having reviewed the entire act and seen or at least deducing that it makes sense that this would kind of be the missing piece that fills in there?

MR. HENRY: Your Honor, I'll admit, I've read the act but I have not done a legislative history analysis and so I can not speak to that.

THE COURT: All right. Thank you, Mr. Henry, [26] I appreciate it.

All right. Mr. Hart.

MR. HART: Thank you, Your Honor.

Your Honor, I don't have very much to add beyond what I presented in my brief but on that last point related to 42 U.S.C. 16928 related to, as Mr. Henry indicated, folks that leave here and then come back, I think the Court's point about, this is actually folks that are entering the United States, the Court's reading of that I think is in line, especially when one goes back to the definition section, Section – and this is 16911 Section (5)(b) or Subsection (5)(b) relating to foreign convictions and so what this relates to is folks that are outside the United States who have a [sic] committed sex offense and when they enter the United States, that they may in certain circumstances be required to register within the relevant jurisdictions.

I'll let the court read –

THE COURT: I'm right with you.

MR. HART: So what section – and I'm just going to refer to the last two digits, what Section 28 refers to is not that we're – hey, we're letting you leave the jurisdiction and once you leave you're free to go, and we only care when you come back, that's not [27] what 28 says.

Because that's one – if that is what it does say, that would support the defendant's argument that

Congress intended that when you leave, we don't care. I don't think Congress intended for folks – for the United States to essentially export our sex offenders. What they wanted to create was a system where individuals had to notify law enforcement where they were.

And I know the language that the defense hangs their hat on is the word "resides" which is the present tense, and I think the *Murphy* court does not do a lot of gymnastics, it is – the *Murphy* court does a lot of logical analysis in the context of our statutory canon – or statutory construction canon and essentially comes down to the right place, that when Congress enacted this, "jurisdiction" means something different than what – what the defense is arguing the word "resides" means. And I think this is also found in Section 42 U.S.C.(a) Section 16914 where it talks about the information to be provided by the offender.

And in Subsection (3) of (a), it is the address of each residence at which the offender resides or will reside. And so there we have a – you're supposed to provide where you are going, where you will [28] reside, and that is important in the context of the overall statutory construction when one goes back to 16913, Subsection (c), which is keeping the registration current that a sex offender shall not later than three business days after each change of residence notify the jurisdiction involved.

And so what that talks about when it talks about a jurisdiction involved, it is the place where the

defendant or the sex offender is currently residing, as well as where they end up going and as the *Murphy* court discusses, in some cases the defendant's travel may take longer than those three business days and so he has the obligation to where he left and where he ends up. And we've even seen this in some cases relating to the travel arrangements, where an individual leaves a jurisdiction, goes through another couple of jurisdictions and arrives at another one, where venue is appropriate.

And there is – and I cannot recall the name of it, it is *Pietrantonio*, I know it was referenced in Judge Melgren's recent opinion in *United States v. Marcus Sabation Lewis* discussing similar type of issues but, ultimately, jurisdiction is – jurisdiction involved is a different analysis than where the offender resides, and that's sort of what *Murphy* gets [29] down to.

I have read the *Lunsford* case out of the Eighth Circuit. Quite frankly, I think they decided it wrong. I think their analysis sort of stopped at the syntactical, as opposed to looking at the overall context and the overall purpose of the statute.

And if you look at the *Lunsford* case and then look at what it means to keep a registration current and notifying not later than three business days after, well, if the only point in time where you are supposed to notify somebody is when you are there, there would never be any instance where you would notify them three days after.

So this whole notion of a present tense construction controls I think in the overall context of the SORNA statute, I think that is erroneous and I think the *Murphy* court decided that correctly.

I don't think I can really add anything beyond my brief on the nondelegation arguments, but if the court has any questions, I will attempt to answer them as best I'm able.

THE COURT: Well, I think you have all pretty well covered the waterfront on it and I appreciate it.

And, Mr. Henry, I appreciate your answering my questions.

[30] I am not going to decide this right this moment but I am going to take another look. I will just tell you, so there is no great mystery about it, my inclination at this point based on what I have read and the reasoning of those cases is to deny the motion to dismiss, but I am going to take a look again at the authorities and to see if there is anything else out there, particularly in the legislative history of 924 to see if the interpretation that Mr. Henry is urging on behalf of Mr. Nichols has any legs or not.

I am reading it just as I said, and as Mr. Hart had indicated, it doesn't talk about reentry, it talks about persons coming in.

There is the provision about foreign offenders and how they have to register unless it's pretty clear that they have not actually been through a system

that has something approaching due process of law on the criminal side of things so, counsel, thank you all so much.

Mr. Henry.

MR. HENRY: Your Honor, just on that last point that you – you mentioned regarding the government's argument on foreign convictions, in 16928, that statute that talks about the AG is supposed to set up and maintain a system informing relevant [31] jurisdictions about persons?

THE COURT: Right.

MR. HENRY: It says – doesn't say foreign convicted people, it says who are required to register under the subchapter.

THE COURT: That's exactly right.

MR. HENRY: And so it – I think that is a – it does not apply just to foreign convictions, I think it applies to every person who is out of the U.S. jurisdiction who comes back in, or who was someone from another citizen of another country who comes in but has that type of a conviction. And it's interesting –

THE COURT: I understand. You've already made that argument, Mr. Henry. That's the argument you're making on behalf of Mr. Nichols here and all I am saying is it doesn't say "reentering," it talks about "entering." That could be somebody I guess who left once and then comes back; that's an entry, it's not a reentry.

MR. HENRY: Yeah.

THE COURT: So, I am – you haven't waived an argument here, Mr. Henry.

MR. HENRY: Okay. Thank you.

THE COURT: You bet.

All right. Well, thank you all so much. That [32] will conclude this matter for today. (Proceedings conclude at 10:50 a.m.)

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[33] CERTIFICATE

I, Jana L. McKinney, United States Court Reporter in and for the District of Kansas, do hereby certify:

That the above and foregoing proceedings were taken by me at said time and place in stenotype;

That thereafter said proceedings were transcribed under my discretion and supervision by means of computer-aided transcription, and that the above and foregoing constitutes a full, true and correct transcript of requested proceedings;

That I am a disinterested person to the said action.

IN WITNESS WHEREOF, I hereto set my hand on this, the 23rd day of April, 2014.

s/ Jana L. McKinney
Jana L. McKinney, RPR, CRR, RMR
United States Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

United States of America,

Plaintiff,

vs. Case No. 13-10106-JTM

Lester Ray Nichols,

Defendant.

MEMORANDUM AND ORDER

(Filed Nov. 12, 2013)

The defendant, Lester Ray Nichols, is charged with knowingly failing to register and update his registration as required by the Sex Offender Registration and Notification Act (SORNA) in violation of 18 U.S.C. § 2250(a). The matter is before the court on Nichols's motion to dismiss the charge, arguing that SORNA does not apply to him under the circumstances of his case.

In 2003, Nichols was convicted of interstate travel to engage in sex with a minor, in violation of 18 U.S.C. § 2423(b). *United States v. Nichols*, No. 03-10127-MLB (D. Kan. Dec. 17, 2003). He was sentenced to 120 months imprisonment.

Nichols was released from prison and under federal supervision in the District of Kansas in 2012. Up until that time, he had complied with both Kansas and federal authorities in keeping his sex offender registry up to date every three months. He

last registered in early October, 2012, and he was to renew his registration in early January, 2013.

However, in early November, 2012, Nichols boarded a plane from Kansas City International Airport to Manila, Philippines. On November 16, a warrant was issued to arrest Nichols for violation of his supervised release.

On December 26, 2012, law enforcement officers of the Manila Police and Philippine Bureau of Immigration arrested Nichols at a Manila hotel. After he was identified, Nichols met with an agent of the United States Department of State, Diplomatic Security Service (DSS). Nichols was held in custody and deported by plane to Los Angeles, California, where he was taken into custody by the United States Marshal Service and transported to Kansas to face the present charge.

Nichols contends that SORNA did not require him to register as a sex offender while he was in the Philippines. 42 U.S.C. § 16913(a) requires:

> A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

SORNA explicitly defines "jurisdiction" as:

> (A) A State.
> (B) The District of Columbia.
> (C) The Commonwealth of Puerto Rico.
> (D) Guam.
> (E) American Samoa.
> (F) The Northern Mariana Islands.
> (G) The United States Virgin Islands.
> (H) To the extent provided and subject to the requirements of section 16927 of this title, a federally recognized Indian tribe.

42 U.S.C. § 16911(10). Further, SORNA provides that "[t]he term 'resides' means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives." 42 U.S.C. § 16911(13).

Finally, 42 U.S.C. § 16928 provides:

> The Attorney General, in consultation with the Secretary of State and the Secretary of Homeland Security, shall establish and maintain a system for informing the relevant jurisdictions about persons entering the United States who are required to register under this subchapter. The Secretary of State and the Secretary of Homeland Security shall provide such information and carry out such functions as the Attorney General may direct in the operation of the system.

The defendant agues [sic] that he does not fall under SORNA because he resided in the Philippines, a foreign country. In advancing this argument, the

defendant acknowledges *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011). In *Murphy*, the court held the defendant violated SORNA when he moved form [sic] his residence in Utah to Belize. It observed that

> although SORNA gives a sex offender the ability to satisfy his registration requirement in one state by updating his registration in another state, he cannot do so by registering in a foreign country, because it is not a SORNA jurisdiction. Thus, a sex offender relocating abroad must satisfy his reporting obligations in a jurisdiction involved.
>
> In sum, it is plain that the definitions in § 16911 and the registration obligation in § 16913 require a sex offender, upon changing his residence, to update his registration in a jurisdiction involved – in this case, where the offender has a home or habitually lives or works – even if he did not establish a new residence in a SORNA jurisdiction. To put it more directly, when a sex offender changes residences, jobs, or student status, a reporting obligation arises in a state where he lives, works, or is in school.

664 F.3d at 803. According to the court, the SORNA requirement that the defendant update his registration "attached when he left Bonneville, while he was still in Utah, and not when he arrived in Belize." *Id.* at 804.

Here, Nichols advances several rationales as to why *Murphy* was mistaken, including the verb tense used for "resides" under 42 U.S.C. § 16911(13), and

that the intent of Congress to limit the extraterritorial effect of SORNA is reflected in 42 U.S.C. § 16928. He also notes that similar arguments have succeeded in persuading the Eighth Circuit to reach a conclusion contrary to *Murphy* in *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013).

Murphy, however, remains controlling authority, and establishes that Nichols violated SORNA when he did not update his registration in Kansas prior to departing for Manilla. Under SORNA, "[t]he permanent abandonment of an abode constitutes a change of residence, regardless of whether a new residence has been formally adopted." *Murphy*, 664 F.3d at 802-03. While Nichols could not make a new registration in the Philippines, SORNA permitted and required notice of the change in State of Kansas. "[T]his statutory construction aligns with legislative intent, because Congress's goal in enacting SORNA was to ensure that sex offenders could not avoid registration requirements by moving out of state." *Id.*

Alternatively, Nichols argues that 42 U.S.C. § 16913(d) is unconstitutional, as the statute improperly delegates legislative power to the Attorney General to determine whether SORNA should be applied retroactively to pre-Act offenders. Again, Nichols acknowledges that there is a recent Tenth Circuit case reaching a contrary conclusion, *United States v. Rickett*, ___ Fed. Appx. ___, 2013 WL 4750781 (10th Cir. 2013). He correctly notes that in *Rickett*, the court did not directly address the issue of whether application of SORNA to pre-Act offenders

violates the non-delegation principle. In *Rickett*, the defendant had pled guilty to the offense, so the Tenth Circuit only decided that the application of SORNA was not plain error.

Plain error is "(1) error that is (2) plain, (3) affects substantial rights, and (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. DeChristopher*, 695 F.3d 1082, 1091 (10th Cir.2012). In *Rickett*, the court held that the defendant's SORNA challenge failed at the second stage; since the "purported constitutional infirmity under the nondelegation doctrine is anything but plain (i.e., clear or obvious), we . . . need not reach prongs one, three, or four." 2013 WL 4750781, at *5. The court held that the defendant could not establish plain error, because under this standard "to render an alleged error 'clear' or 'obvious,' Mr. Rickett needs *controlling* Supreme Court or Tenth Circuit precedent, or a hefty weight of *controlling* authority from other circuits. *Id.* at *7 (emphasis in *Rickett*). Since the defendant could cite to only a few "concurring and dissenting opinions of several jurists who have noted a potential delegation problem with § 16913(d)'s grant of authority to the Attorney General," he did not meet this standard. *Id.*

However, while *Rickett* is not controlling here given its plain error analysis, the rest of the opinion places his argument strongly in doubt. First, the Tenth Circuit reviewed the history of the non-delegation doctrine, ultimately concluding that the doctrine was virtually dead:

To facilitate our analysis of whether any error here is "clear" or "obvious" we begin with a brief discussion of the origin and evolution of the nondelegation doctrine. "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). The doctrine derives from the Constitution's opening declaration that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. Fidelity to the constitutional text and to the structure of government that the Constitution sets up "mandate[s] that Congress generally cannot delegate its legislative power to another Branch." *Mistretta*, 488 U.S. at 372. Congress may, however, vest "decision-making authority" in a coordinate branch so long as it provides "an intelligible principle to which the person or body authorized to [act] is directed to conform." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) (alteration in original) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928)) (internal quotation marks omitted).

Between 1789 and 1935 – a period spanning 146 years of constitutional history – the Supreme Court "never struck down a challenged statute on delegation grounds." *Mistretta*, 488 U.S. at 373. Then, in 1935, the Court invalidated two statutes as

> unconstitutional delegations of legislative power. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542, 55 S.Ct. 837, 79 L.Ed. 1570 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430, 55 S.Ct. 241, 79 L.Ed. 446 (1935); *see also* 1 Ronald D. Rotunda & John E. Nowak, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 4.8(b), at 649 n. 17 (5th ed. 2012) ("The only time the Court clearly invalidated a statute for being an excessive delegation of legislative authority was 1935.").
>
> The doctrine went dormant thereafter, and the Supreme Court has since upheld, "without deviation, Congress' ability to delegate power under broad standards." *Mistretta*, 488 U.S. at 373; *see Whitman*, 531 U.S. at 474. Indeed, so dormant is the nondelegation doctrine that some have deemed it a "dead letter." *See* Gary Lawson, Delegation and Original Meaning, 88 VA. L.REV. 327, 329 (2002). Still, the Supreme Court has never expressly overruled *Schechter Poultry* or *Panama Refining*; so the doctrine, even if dead, has never received a proper burial.

2013 WL 4750781, at *5-6.

Second, while some dissenting and concurring opinions have suggested a nondelegation doctrine challenge to the application of SORNA to pre-Act offenders, the court stressed that the decisions squarely considering the issue are "abundant," and that the "clear weight of appellate authority" rejects the argument. *Id.* at *7.

[W]e note that neither the Supreme Court nor our court has ever addressed whether § 16913(d) is an unconstitutional delegation to the Attorney General. . . . Moreover, those circuits that have considered similar non-delegation challenges to SORNA have uniformly rejected them. *See, e.g.*, *United States v. Kuehl*, 706 F.3d 917, 920 (8th Cir.2013); *United States v. Parks*, 698 F.3d 1, 7-8 (1st Cir.2012), cert. denied, ___ U.S. ___, 133 S.Ct. 2021, 185 L.Ed.2d 889 (2013); *United States v. Felts*, 674 F.3d 599, 606 (6th Cir.2012); *United States v. Guzman*, 591 F.3d 83, 91-93 (2d Cir.2010); *United States v. Whaley*, 577 F.3d 254, 263-64 (5th Cir.2009); *United States v. Ambert*, 561 F.3d 1202, 1212-15 (11th Cir.2009); *see also Kuehl*, 706 F.3d at 920 ("We agree with our sister Circuits that section 16913(d) of SORNA is a valid delegation of authority because Congress provided the Attorney General with an intelligible principle to follow." (footnote omitted) (collecting cases)); *Parks*, 698 F.3d at 8 ("All other circuits that have addressed the issue [as to SORNA] have rejected the delegation objection, which modern case law tends regularly to disfavor."); *cf. United States v. Dixon*, 551 F.3d 578, 583-84 (7th Cir.2008) ("Likewise without merit is his argument that for Congress to delegate to an official of the executive branch the authority to fill out the contours of a statute violates the separation of powers. It is commonplace and constitutional for Congress to delegate to executive agencies the fleshing out of criminal statutes

> by means of regulations."), *rev'd on other grounds sub nom., Carr v. United States*, 560 U.S. 438, 130 S.Ct. 2229, 176 L.Ed.2d 1152 (2010).

Id. (footnotes omitted).

Third, the Tenth Circuit in a separate case has observed that "§ 16913 – SORNA's registration provision – does not violate the . . . nondelegation doctrine. . . ." *United States v. Carel*, 668 F.3d 1211, 1214 (10th Cir. 2011).

As the court expressly noted in *Rickett*, this language in *Carel* was dicta and thus not controlling. But while *Rickett* may not be as *automatically* fatal to the defendant's second argument as *Murphy* was to his first, it points to the same result. That is, *Rickett* recognized that (1) the nondelegation doctrine is dead if not buried, (2) that "abundant authority" from other circuits "upholds SORNA in the face of nondelegation challenges," and (3) a prior panel of the Tenth Circuit rejected the argument, albeit in dicta.

Finally, it must be noted that the defendant provides small grounds for supporting his request that the court depart from the "abundant authority" and strike down the application of SORNA based upon a "dead letter" doctrine. Rather, the most the defendant does is to stress that *Rickett* is not technically controlling (Dkt. at 6-7), along with a citation to Justice Scalia's observation in dissent in *Reynolds v. United States*, 132 S.Ct. 975, 986 (2012) (Scalia, J.) (dissenting) that a construction of SORNA which

would grant the Attorney General discretion to apply the statute to pre-Act offenders "seems to me sailing close to the wind with regard to the principle that legislative powers are nondelegable."[1] Other than this single statement made in dissent, the defendant offers no authority for his second argument, and the court finds SORNA is constitutional.

IT IS ACCORDINGLY ORDERED this 10th day of November, 2013, that the defendant's Motion to Dismiss (Dkt. 13) is hereby denied.

s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE

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[1] In *Reynolds*, the defendant was a pre-Act offender who challenged the application of SORNA before the Attorney General had effectively implemented any regulations pursuant to 42 U.S.C. § 16928. The Court held that "the Act's registration requirements do not apply to pre-Act offenders *until the Attorney General so specifies*." 132 S.Ct. at 984 (emphasis added). This would be yet another indication that application of SORNA to pre-Act offenders, based on the broad grant of authority under § 16928, is lawful.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **LESTER RAY NICHOLS,** **Defendant.**	**NO. 13-10106-01 JTM** **PETITION TO ENTER PLEA OF GUILTY AND ORDER ENTERING PLEA** **[Federal Rules of Criminal Procedure, Rules 10 and 11]** (Filed Nov. 13, 2013)

The defendant represents to the Court:

(1) My full true name is: Lester Ray Nichols. I am 72 years of age. I have completed the 9th *grade and have obtained my GED*. I request that all proceedings against me be in my true name.

(2) I am represented by a lawyer, his name is:

Timothy J. Henry, Assistant Federal Public Defender.

(3) I received a copy of the Indictment[1] before being called upon to plead. I read the Indictment and have discussed it with my lawyer. I fully understand every charge made against me.

[1] "Indictment" also includes "Information."

(4) I told my lawyer all the facts and circumstances known to me about the charges made against me in the Indictment. I believe that my lawyer is fully informed on all such matters.

(5) I know that the Court must be satisfied that there is a factual basis for a plea of "GUILTY" before my plea can be accepted. I represent to the Court that I did the following acts in connection with the charges made against me in Count *1 of the Indictment: that on or about November 9, 2012, in the District of Kansas and elsewhere, I am an individual required to register under the Sex Offender Registration and Notification Act after having been convicted in U.S. District of Kansas case # 03 CR 10127, Interstate Travel to Engage in Sex with Minor, and that I abandoned my residence in Kansas and traveled to Manila, Philippines where I established my residence until I was arrested on December 26, 2012, and returned to the United States, and did not notify any law enforcement authority of this change in residence, in violation of 18 U.S.C. § 2250(a).*

(6) My lawyer has counseled and advised me on the nature of each charge, on all lesser included charges, and on all possible defenses that I might have in this case.

(7) I know that I have the right to plead "NOT GUILTY" to any offense charged against me. If I plead "NOT GUILTY" I know the Constitution guarantees me (a) the right to a speedy and public trial by a jury; (b) at that trial, and at all stages of the

proceedings, the right to the assistance of a lawyer; (c) the right to see and hear all witnesses called to testify against me, and the right to cross-examine those witnesses; (d) the right to use the power and process of the Court to compel the production of any evidence, including the attendance of any witnesses in my favor; and (e) the right not to be compelled to incriminate myself by taking the witness stand; and if I do not take the witness stand, no inference of guilt may be drawn from such failure.

(8) I know that if I plead "GUILTY," I am thereby waiving my right to a trial, and that there will be no further trial of any kind, either before a Court or jury; and further, I realize the Court may impose the same punishment as if I had pleaded "NOT GUILTY," stood trial, and been convicted by a jury.

(9) I know that if I plead "GUILTY," the Court will ask me questions about the offense(s) to which I have pleaded, and since I will be answering these questions under oath, on the record, and in the presence of my lawyer, that my answers may later be used against me in a prosecution for perjury or false statement.

(10) My lawyer informed me that the plea of "GUILTY" could subject me to a mandatory minimum sentence of not less than 0 years (if applicable) and to a maximum punishment which, as provided by law, is 10 years to be followed by a term of supervised release of at least 5 years on (Title 21 Drug Offense) and not to exceed life, and a fine of not more than

$250,000 (which may accrue interest if not paid at time of sentencing) for the offense charged in Count 1 of the Indictment. I have also been informed that should the Court find me in violation of the supervised release term, the term could be revoked and an additional term of imprisonment not to exceed 2 years may be imposed. I have also been informed that the Court may order me to make restitution in compliance with 18 U.S.C. § 3663 and § 3664 or as a condition of supervision, if such is ordered under 18 U.S.C. § 3563, in addition to any other penalty provided by law. I further understand that if I am pleading "GUILTY" to an offense which is subject to the Sentencing Reform Act, I cannot be released on parole and, if imprisonment is ordered in my case, the sentence imposed by the Court will be the sentence I serve less any good time credit if I earn it.

(11) I know that in addition to any other penalty imposed, including any fine or restitution order, the Court is required to impose a special monetary assessment in the amount of $_____ for each count in which the offense occurred after November 13, 1984. ($50.00 for a felony, $25.00 for a misdemeanor; if the defendant is other than an individual, the assessment is $200.00 for a felony and $100.00 for a misdemeanor).

The special monetary assessment is $100.00 for each count in which the offense occurred after April 24, 1996. (Not less than $100.00 for a felony, $50.00 for a misdemeanor; if the defendant is other than an individual the assessment is not less than $400.00 for

a felony and $100.00 for a misdemeanor). I UNDERSTAND THIS SPECIAL ASSESSMENT MUST BE PAID AT THE TIME OF THE SENTENCING HEARING UNLESS THE COURT DIRECTS OTHERWISE.

(12) I understand that if my case involves drug trafficking or drug possession, the Court may deny or suspend my eligibility to receive federal benefits pursuant to 21 U.S.C. § 862, except for those specifically exempted. I understand that if this is my second or subsequent conviction for possession of a controlled substance, the Court may order me to complete drug treatment or community service as specified in the sentence as a condition for reinstatement of benefits.

(13) I know that the Court may also order, in addition to the penalty imposed, that I give reasonable notice and explanation of the conviction, in such form as the Court may approve, to the victims of the offense.

(14) I have been advised and understand that if I am not a U.S. citizen, a conviction of a criminal offense may result in deportation from the United States, exclusion from admission to the United States, and/or denial of naturalization.

(15) If I am on probation or parole in this or any other Court, I know that by pleading guilty here, my probation or parole may be revoked and I may be required to serve time in that case, which will be consecutive, that is, in addition to any sentence imposed upon me in this case.

(16) I declare that no officer or agent of any branch of government (federal, state, or local) has promised, suggested, or predicted that I will receive a lighter sentence, or probation, or any other form of leniency if I plead "GUILTY," except as follows:

My attorney did discuss how the Sentencing Guidelines may apply in my case.

If anyone else, including my attorney, made such a promise, suggestion, or prediction, except as noted in the previous sentence, I know that he had no authority to do so.

I know that the sentence I will receive is solely a matter within the control of the Judge. I do understand that there is no limitation on the information the Judge can consider at the time of sentencing concerning my background, character, and conduct, provided the information is reliable, 18 U.S.C. § 3661. I do understand that if I am subject to sentencing under the Sentencing Reform Act and the Sentencing Guidelines issued by the United States Sentencing Commission, a sentencing guideline range is established. The Judge will consider a sentence from within the guideline range and, if my case presents features which persuade the Judge to vary from the guideline the Judge could impose a sentence either above or below the recommended guideline range. In determining the guideline range, any variance, and the sentence to impose, the Court may take into account all relevant criminal conduct, which may include counts to which I have not pled guilty or been

convicted and take into account background characteristics, unless otherwise prohibited by law. I further understand that my background characteristics including, but not limited to, the recency and frequency of my prior criminal record, whether or not a substantial portion of my income resulted from criminal conduct, my role in the offense, victim-related circumstances, and my acceptance of the responsibility for the offense, may have a specific effect on the sentence.

I hope to receive leniency, but I am prepared to accept any punishment permitted by law which the Court sees fit to impose. However, I respectfully request the Court to consider, in mitigation of punishment, that I have voluntarily entered a plea of guilty.

(17) I understand that a U.S. Probation Officer will be assigned to conduct a thorough presentence investigation to develop all relevant facts concerning my case unless the Court finds that there is in the record sufficient information to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. § 3553. The report of the presentence investigation shall contain the factors set forth in Rule 32. These include the classification of the offense and of the defendant under the categories established by the Sentencing Commission, the kinds of sentence available to the Court, and the sentencing range the officer believes applicable. The report shall include the history and characteristics of the defendant and

such other information required by the Court recognizing the factors set forth in paragraph (16) above.

(18) My plea of guilty is the result of my plea agreement entered into between the Government attorney, my attorney, and me.

Since my plea of guilty is the result of a plea agreement, I hereby state that the terms of said agreement are as follows:

See attached plea agreement.

I fully understand that the Court is not bound by the terms of the plea agreement, and may accept or reject said agreement. If the Court rejects the agreement, I also understand the Court will *not* give me the opportunity to withdraw my plea of guilty, unless the plea agreement, signed by all parties, is executed in accordance with Federal Rules of Criminal Procedure, Rule 11(c)(1)(A) or Rule 11(c)(1)(C).

(19) I believe that my lawyer has done all that anyone could do to counsel and assist me, AND I AM SATISFIED WITH THE ADVICE AND HELP HE HAS GIVEN ME.

(20) I know that the Court will not permit anyone to plead "GUILTY" who maintains he/she is innocent and, with that in mind, and because I am "GUILTY" and do not believe I am innocent, I wish to plead "GUILTY" and respectfully request the Court to

accept my plea of "GUILTY" and to have the Clerk enter my plea of "GUILTY" as follows.[2]

Guilty to Count 1 of the Indictment.

(21) My mind is clear, I am not under the influence of alcohol. I currently am not under a doctor's care. The only drugs, medicines or pills that I took within the past seven (7) days are:

Rantidine and two inhalers.

(22) I have never been confined in an institution for the treatment of mental illness. I have never been adjudicated mentally incompetent. No psychiatrist, physician, or psychologist has ever found me to be mentally ill. I know of no reason why my mental competence at the time of the commission of the alleged offense(s), or at the present time, should be questioned. (If there are any exceptions to the above statement, explain below.)

(23) I offer my plea of "GUILTY" freely and voluntarily, and further state that my plea of guilty is not the result of any force or threats against me, or of any promises made to me other than those noted in

---

[2] The defendant's plea of "GUILTY" or "NOT GUILTY" to each offense should be entered in the blank spaces provided in paragraph (20). If the Indictment charges a single offense, a defendant who wishes to plead "GUILTY" should write in paragraph (20) "GUILTY as charged in the Indictment." If more than one offense is charged, the defendant may write in paragraph (20) "GUILTY as charged in Count(s) _____," "NOT GUILTY as charged in Count(s) _____"

this petition. I further offer my plea of "GUILTY" with full understanding of all the matters set forth in the Indictment and in this petition, and in the certificate of my attorney which is attached to this petition.

(24) I waive the reading of the Indictment in open court, and I request the Court to enter my plea of "GUILTY" as set forth in paragraph (20) of this petition.

(25) I swear that I have read, understood, and discussed with my attorney, each and every part of this Petition to Plead Guilty, and that the answers which appear in every part of this petition are true and correct.

Signed and Sworn to by me in open court, in the presence of my attorney, this 13th day of November, 2013.

/s/ Lester Ray Nichols
Lester Ray Nichols, Defendant

Subscribed and Sworn to before me this 13th day of *November*, 2013.

/s/ Sue Smith
(Deputy Clerk)

CERTIFICATE OF COUNSEL

The undersigned, as lawyer and counselor for the defendant Lester Ray Nichols hereby certifies:

(1) I have read and fully explained to the defendant the allegations contained in the Indictment in this case.

(2) To the best of my knowledge and belief, the statements, representations and declarations made by the defendant in the foregoing petition are in all respects accurate and true.

(3) I explained the maximum penalty for each count to the defendant.

(4) The plea of "GUILTY" offered by the defendant in paragraph (20) accords with my understanding of the facts he related to me and is consistent with my advice to the defendant.

(5) In my opinion, the defendant's waiver of reading of the Indictment in open court as provided by Rule 10 is voluntarily and understandingly made, and I recommend to the Court that the waiver be accepted.

(6) In my opinion, the plea of "GUILTY" offered by the defendant in paragraph (20) of the petition is voluntarily and understandingly made. I recommend that the Court accept the plea of "GUILTY."

(7) I have made no predictions or promises to the defendant concerning any sentence the Court may award, except as noted in the space below:

I have discussed with my client how the Sentencing Guidelines may apply in his case.

(8) I further represent to the Court that the defendant's plea of "GUILTY" is the result of a plea agreement. The terms of the agreement are set out in paragraph (18) of the petition, and I have informed the defendant that the Court is not bound by the terms of the agreement and that if the Court rejects the agreement, the Court will not give him the opportunity to withdraw his plea of "GUILTY," unless the plea agreement, signed by all parties, is executed in accordance with Federal Rules of Criminal Procedure, Rule 11(c)(1)(A) or Rule 11(c)(1)(C).

Signed by me in open court in the presence of the defendant above named and after full discussion of the contents of this certificate with the defendant, this 13th day of November, 2013.

/s/ Timothy J. Henry
Timothy J. Henry,
Assistant Federal Public Defender

ORDER

I find that the plea of guilty was made by the defendant freely, voluntarily, and because he is guilty as charged, and not out of ignorance, fear, inadvertence or coercion, and with full understanding of its consequences. I further find that the defendant has

admitted the essential elements of the crime charged and is mentally competent.

IT IS THEREFORE ORDERED that the defendant's plea of "GUILTY" be accepted and entered as prayed for in the petition and as recommended in the certificate of his lawyer.

Done in open court this 13th day of November, 2013.

/s/ J. Thomas Marten
J. THOMAS MARTEN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
VS.	)	**NO. 13-10106-01-JTM**
LESTER RAY NICHOLS,	)	
Defendant.	)	

PLEA AGREEMENT

(Filed Nov. 13, 2013)

The United States of America, by and through Assistant United States Attorney, Jason W. Hart, and Lester Ray Nichols, the defendant, personally and by and through defendant's counsel, Tim Henry, hereby enter into the following plea agreement pursuant to Rule 11 of the Federal Rules of Criminal Procedure:

1. ***Defendant's Guilty Plea.*** The defendant agrees to plead guilty to Count 1 of the Indictment charging a violation of Title 18, United States Code, § 2250, that is, Failure to Register or Update a Registration. By entering into this plea agreement, the defendant admits to knowingly committing this offense, and to being guilty of the offense. The defendant understands that the maximum sentence which may be imposed as to Count 1 of the Indictment is not more than ten (10) years of imprisonment, a $250,000 fine, not less than five (5) years and up to life

of supervised release, and a $100 mandatory special assessment.

2. *Factual Basis for the Guilty Plea.* The parties agree the facts constituting the offense to which the defendant is pleading guilty are as follows:

> The defendant, Lester Ray Nichols, admits that he was previously convicted in September 2003 of a violation of 18 U.S.C. 2423(b), for which he received a sentence of ten (10) years followed by five (5) years supervised release. He was also required to comply with any laws regarding sex offender registration.
>
> The defendant, Lester Ray Nichols, admits that he initially registered with the Leavenworth County (Kansas) Sheriff on December 30, 2011, and provided a current physical residence of 4715 Brewer Place, Leavenworth, Kansas. He then updated his registration on January 19, 2012, in accordance with his schedule registration requirement (because his birthday was January 24, he was required to report in the month of January, April, July, and October). In April 2012, he updated his registration to reflect a change in his current physical address, providing an address of 920 N 2nd Street, Apt. C, Leavenworth, Kansas. He reported the same address again in July 2012 and again in October 2012. His last registration reflects a current physical

residence of 920 N 2nd Street, Apt. C, Leavenworth, Kansas on October 1, 2012. For each of these registrations, he also reviewed, comprehended, and initialed the Acknowledgement of the Offender form which set forth his sex offender registration requirements, including:

> Paragraph 7, "I must register in person upon commencement, change, or termination of residence location, employment status, school attendance or other information within three days of such commencement, change or termination, to the registering law enforcement agency or agencies where last registered and provide written notice to the Kansas bureau of investigation."
>
> Paragraph 14, "If I travel outside of the United States, I will report in person to the registering law enforcement agency and provide written notice to the Kansas bureau of investigation 21 days prior to any such travel. I will provide an itinerary including, but not limited to, destination, means or transport and duration of travel."
>
> Paragraph 17, "Pursuant to Title 18, United States Code, Section 2250, if a sex offender fails to register or fails to report a change in residence,

> employment, or student status, and travels in or moves across state lines, the offender can be charged with a federal crime and punished by up to ten (10) years imprisonment."
>
> The defendant, Lester Ray Nichols, admits that, on November 9, 2012, he abandoned his residence in Kansas and traveled to Kansas City, Missouri, where he boarded a flight departing from MCI with a final destination of Manila, Philippines. Once in Manila, he established a new residence at the Boulevard Mansion Hotel. He was arrested in Manila on December 26, 2012. At no time did the defendant notify any law enforcement authority of his intent to change residence and travel to Manila, Philippines.

3. ***Application of the Sentencing Guidelines.*** The parties request that the United States Sentencing Guidelines (Guidelines) be used to calculate the applicable sentence in this case. The parties understand that the guidelines are advisory, and that correct calculation of the applicable guideline is one part of the sentencing factors that the Court shall consider pursuant to Title 18, United States Code, § 3553(a)(4)(A).

4. ***Government's Agreements.*** In return for the defendant's plea of guilty as set forth herein, the United States Attorney for the District of Kansas agrees:

a. To not file any additional charges against the defendant arising out of the facts forming the basis for the present Indictment;

b. To recommend the defendant receive a two (2) level reduction in the applicable offense level under U.S.S.G. § 3E1.1 for acceptance of responsibility. In addition, if the defendant's offense level is 16 or greater, the United States will move at the time of sentencing for the defendant to receive an additional one (1) level reduction for acceptance of responsibility because the defendant timely notified the government of his intention to enter a plea of guilty;

c. To recommend a sentence no higher than the top of his applicable guideline range; and

d. The defendant is free to argue for departure or variance.

The government's obligation concerning its agreements listed in ¶ 4 are contingent upon the defendant's continuing manifestation of acceptance of responsibility as determined by the United States. If the defendant denies or gives conflicting statements as to his involvement, willfully obstructs or impedes the administration of justice as defined in U.S.S.G. § 3C1.1 (or willfully attempts to do so), or engages in additional criminal conduct, the United States reserves the right to request a hearing to determine if the defendant has breached this agreement.

In the event the Court finds the defendant has breached this plea agreement or otherwise failed to adhere to its terms, the United States shall not be bound by this paragraph and may pursue any additional charges arising from the criminal activity under investigation as well as any perjury, false statement, or obstruction of justice charges which may have occurred. The defendant understands and agrees that in the event the defendant violates this plea agreement, all statements made by the defendant subsequent to the execution of this plea agreement, any testimony given by defendant before a grand jury or any tribunal or any leads from such statements or testimony shall be admissible against the defendant in any and all criminal proceedings. The defendant waives any rights which might be asserted under the United States Constitution, any statute, Federal Rule of Criminal Procedure 11(f), Federal Rule of Evidence 410, or any other federal rule that pertains to the admissibility of any statements made by the defendant subsequent to this plea agreement.

5. ***Sentence to be Determined by the Court.*** The defendant understands that the sentence to be imposed will be determined solely by the United States District Judge. The United States cannot and has not made any promise or representation as to what sentence the defendant will receive.

6. ***Withdrawal of Plea Not Permitted.*** The defendant understands that if the court accepts this plea agreement but imposes a sentence with which

the defendant does not agree, the defendant will not be permitted to withdraw this plea of guilty.

7. ***Payment of Special Assessment.*** The defendant understands that a mandatory special assessment of $100.00 per count of conviction will be entered against the defendant at the time of sentencing. The burden of establishing an inability to pay the required special assessment lies with the defendant.

8. ***Conditional Plea.*** If the Court consents, the defendant enters a conditional plea pursuant to Federal Rule of Criminal Procedure 11(a)(2) to allow for an appeal of the decision rendered by the Court (reflected in Document 20) in denying his motion to dismiss (reflected in Documents 13).

9. ***Waiver of Appeal and Collateral Attack.*** With the exception of the two issues raised and litigated in the defendant's Motion to Dismiss, which was denied by the Court, the defendant knowingly and voluntarily waives any right to appeal or collaterally attack any matter in connection with this prosecution, the defendant's conviction, or the components of the sentence to be imposed herein (including the length and conditions of supervised release, as well as any sentence imposed upon a revocation of supervised release). The defendant is aware that Title 18, U.S.C. § 3742 affords a defendant the right to appeal the conviction and sentence imposed. By entering into this agreement, the defendant knowingly waives any right to appeal a sentence imposed which is within the guideline range determined appropriate by the court. The defendant also waives any right to

challenge a sentence or otherwise attempt to modify or change his sentence or manner in which it was determined in any collateral attack, including, but not limited to, a motion brought under Title 28, U.S.C. § 2255 [except as limited by United States v. Cockerham, 237 F.3d 1179, 1187 (10th Cir. 2001)], and a motion brought under Fed. Rule of Civ. Pro 60(b). In other words, the defendant waives the right to appeal the sentence imposed in this case except to the extent, if any, the court departs upwards from the applicable sentencing guideline range determined by the court. However, if the United States exercises its right to appeal the sentence imposed as authorized by Title 18, U.S.C. § 3742(b), the defendant is released from this waiver and may appeal the sentence received as authorized by Title 18, U.S.C. § 3742(a). Not withstanding the forgoing waivers, the parties understand that the defendant in no way waives any subsequent claims with regards to ineffective assistance of counsel or prosecutorial misconduct.

10. ***FOIA and Privacy Act Waiver.*** The defendant waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case including, without limitation, any records that may be sought under the Freedom of Information Act, Title 5, U.S.C. § 552 and the defendant waives any rights conferred under the Privacy Act of 1974, Title 5, U.S.C. § 552a to prevent or object to the disclosure of records or materials pertaining to this case.

11. ***Full Disclosure by United States.*** The defendant understands the United States will provide to the court and the United States Probation Office all information it deems relevant to determining the appropriate sentence in this case. This may include information concerning the background, character, and conduct of the defendant including the entirety of the defendant's criminal activities. The defendant understands these disclosures are not limited to the count to which the defendant has pled guilty. The United States may respond to comments made or positions taken by the defendant or defendant's counsel and to correct any misstatements or inaccuracies. The United States further reserves its right to make any recommendations it deems appropriate regarding the disposition of this case, subject only to any limitations set forth in this plea agreement. The defendant also has the right to provide information concerning the offense and to make recommendations to the court and the United States Probation Office.

12. ***Parties to the Agreement.*** The defendant understands this plea agreement binds only the defendant and the United States Attorney for the District of Kansas, and that it does not bind any other federal, state, or local prosecution authority.

13. ***No Other Agreements.*** The defendant has had sufficient time to discuss this case, the evidence, and this agreement with the defendant's attorney and defendant is fully satisfied with the advice and representation provided by defendant's counsel. Further, the defendant acknowledges that he has read the plea agreement, understands it and agrees it is true and

accurate and not the result of any threats, duress or coercion. The defendant further understands that this plea agreement supersedes any and all other agreements or negotiations between the parties, and that this agreement embodies each and every term of the agreement between the parties. The defendant acknowledges that the defendant is entering into this agreement and is pleading guilty because the defendant is guilty and is doing so freely and voluntarily.

/s/ Jason W. Hart Date: 11/13/13
Jason W. Hart
Assistant U.S. Attorney
301 N. Main, Suite 1200
Wichita, Kansas 67202
(316) 269-6481
Kan. Sup. Ct. No. 20276

/s/ Debra Barnett Date: 11/13/2013
Debra Barnett
Assistant U.S. Attorney
Criminal Coordinator, Wichita

/s/ Lester Ray Nichols Date: 11-13-13
Lester Ray Nichols
Defendant

/s/ Tim Henry Date: 11-13-13
Tim Henry
Assistant Federal Public
Defender
301 N. Main, Suite 850
Wichita, Kansas 67202
Attorney for Defendant

United States District Court
District of Kansas

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	Case Number: 6:13CR10106 – 001
Lester Ray Nichols	USM Number: 09657-031
	Defendant's Attorney: Timothy J. Henry

THE DEFENDANT:

☒ pleaded guilty to count(s): 1 of the Indictment

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) ___ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 2250(a)	FAILURE TO REGISTER OR UPDATE A REGISTRATION, a Class C Felony	11/09/2012	1

The defendant is sentenced as provided in pages 1 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____.

☐ Count(s) ___ is dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of material changes in economic circumstances.

02/12/2014
Date of Imposition of Judgment

s/ J. Thomas Marten
Signature of Judge

Honorable J Thomas Marten,
U.S. District Judge
Name & Title of Judge

February 13, 2014
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 10 months.

☒ The court makes the following recommendations to the Bureau of Prisons:

At the request of defense counsel, the Court recommends that the defendant be designated to an institution in Texas in order to facilitate visitation with his family.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at ____ on ____.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before ____ on ____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check if applicable)*

☒ The defendant is prohibited from possessing or purchasing a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check if applicable)*

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check if applicable)*

☐ The defendant shall register as a sex offender, and keep the registration current, in each jurisdiction where the defendant resides, where the defendant is an employee, and where the defendant is a student. For initial registration purposes only, the defendant shall also register in the jurisdiction in which convicted, if such jurisdiction is different from the jurisdiction of residence. Registration shall occur not later than 3 business days after being sentenced, if the defendant is not sentenced to a term of imprisonment. The defendant shall, not later than 3 business days after each change in name, residence, employment, or student status, appear in person in at least one jurisdiction in which the defendant is registered and inform that jurisdiction of all changes in the information required. *(Check if applicable)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check if applicable)*

If this judgment imposes a fine or restitution, it is to be a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer in a manner and frequency directed by the court or the probation officer;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substances or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony

unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall successfully participate in a mental health treatment program and/or sex offender treatment program. The defendant shall abide by all program rules, requirements, and conditions of the sex offender treatment program, which may include plethysmograph, polygraph, and visual reaction testing as approved by the Probation Office to assess the defendant's risk level and determine if the defendant is in compliance with the conditions of supervision. The

defendant shall contribute to the cost based on the ability to pay.

2. The defendant shall refrain from any unsupervised contact with minors during the term of supervision unless approved by the U.S. Probation Officer.

3. The defendant shall neither possess nor have under his/her control any material that depicts sexually explicit conduct involving adults or minor[s], child pornography, or visual depictions of minor[s] engaged in sexually explicit conduct, all as defined in 18 U.S.C. 2256.

4. As directed by the U.S. Probation Officer, the defendant shall cooperate with and abide by the policies of the United States Probation Office's Computer and Internet Monitoring Program which includes restrictions and/or prohibitions related to: computer and Internet usage, possession and use of electronic, cellular, gaming, and Internet appliance devices; possession and use of computer hardware and software, encryption hardware or software, and accessing certain types of web sites to include: social networking, chat rooms, and those depicting sexually explicit conduct or pornographic material. The defendant will also be subject to computer monitoring, and will provide the United States Probation Office with a complete inventory of all electronic and Internet capable devices, user account information as well as password(s).

5. The defendant shall submit his/her person, house, residence, vehicle(s), papers, business or place of employment and any property under the

defendant's control to a search, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

6. The defendant is prohibited from possessing or purchasing a firearm, ammunition, destructive device, or any other dangerous weapon.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the total criminal monetary penalties under the Schedule of Payments set forth in this Judgment.

	Assessment	Fine	Restitution
Totals:	$ 100	None	None

☐ The determination of restitution is deferred until ____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However,

pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals:	$	$	

☐ Restitution amount ordered pursuant to plea agreement $ __

☐ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on set forth in this Judgment may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

  ☐ the interest requirement is waived for the ☐ fine and/or ☐ restitution.

  ☐ The interest requirement for the [] fine and/or ☐ restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☐ Lump sum payment of $ ____ due immediately, balance due

☐ not later than _____ , or

☐ in accordance ☐ C, ☐ D, or ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D or, ☒ F below); or

C ☐ Payment in monthly installments of not less than 5% of the defendant's monthly gross household income over a period of ___ years to commence ___ days after the date of this judgment; or

D ☐ Payment of not less than 10% of the funds deposited each month into the inmate's trust fund account and monthly installments of not less than 5% of the defendant's monthly gross household income over a period of ___ years, to commence _ days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within ___ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

If restitution is ordered, the Clerk, U.S. District Court, may hold and accumulate restitution payments, without distribution, until the amount accumulated is such that the minimum distribution to any restitution victim will not be less than $25.

Payments should be made to the Clerk, U.S. District Court, U.S. Courthouse – Room 259, 500 State Avenue, Kansas City, Kansas 66101.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount Joint and Several Amount and corresponding payee, if appropriate.

Case Number (including Defendant Number)	Defendant Name	Joint and Several Amount

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States. Payments against any money judgment ordered as part of a forfeiture order should be made payable to the United States of America, c/o United States Attorney, Attn: Asset Forfeiture Unit, 1200 Epic Center, 301 N. Main. Wichita, Kansas 67202

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff,	)	Case No. 13-10106-01 JTM
v.	)	
LESTER RAY NICHOLS, Defendant.	)	

NOTICE OF APPEAL

(Filed Feb. 25, 2014)

NOTICE is hereby given that the above-named defendant, Lester Ray Nichols, hereby appeals to the United States Court of Appeals for the Tenth Circuit, from the judgment imposed on the 12th day of February, 2014, filed with the Court on the 13th day of February, 2014, and entered on the docket the 13th day of February, 2014.

Respectfully submitted,

s/Timothy J. Henry
TIMOTHY J. HENRY
KS Sup. Ct. No. 12934
Assistant Federal Public Defender
Federal Public Defender Office
301 N. Main, Suite 850
Wichita, KS 67202
Telephone: (316) 269-6445
Fax: (316) 269-6175
E-mail: tim_henry@fd.org

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2014, I electronically filed the foregoing NOTICE OF APPEAL with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

Jason W. Hart
Assistant U.S. Attorney
301 N. Main, Suite 1200
Wichita, KS 67202

One copy sent U.S. Mail to:

Lester Ray Nichols
Reg. No. 09657-031
c/o CCA Leavenworth
100 Highway Terrace
Leavenworth, KS 66048

s/Timothy J. Henry
TIMOTHY J. HENRY
KS Sup. Ct. No. 12934
Assistant Federal Public Defender
Federal Public Defender Office
301 N. Main, Suite 850
Wichita, KS 67202
Telephone: (316) 269-6445
Fax: (316) 269-6175
E-mail: tim_henry@fd.org

(NOTE: Identify Changes with Asterisks (*))

United States District Court
District of Kansas

UNITED STATES OF AMERICA

v.

Lester Ray Nichols

AMENDED JUDGMENT IN A CRIMINAL CASE

(Filed Jul. 29, 2014)

Case Number: 6:13CR10106 – 001

USM Number: 09657-031

Defendant's Attorney: Timothy J. Henry

Date of Original Judgment: 02/12/14
(Or Date of Last Amended Judgment)

Reason for Amendment:

☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))

☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))

☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))

☐ Modification of Supervision Conditions (18 U.S.C. § 3563(c) or 3583(e))

☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reason (18 U.S.C. § 3582(c)(1))

☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the

Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

☒ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

☐ Direct Motion to District Court Pursuant
☐ 28 U.S.C. § 2255 or
☐ 18 U.S.C. § 3559(c)(7)

☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

☒ pleaded guilty to count(s): 1 of the Indictment

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) ___ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 2250(a)	FAILURE TO REGISTER OR UPDATE A REGISTRATION, a Class C Felony	11/09/2012	1

The defendant is sentenced as provided in pages 1 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____.

☐ Count(s) __ is dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of material changes in economic circumstances.

*07/29/2014
Date of Imposition of Judgment

s/ J. Thomas Marten
Signature of Judge

Honorable J Thomas Marten,
Chief U.S. District Judge
Name & Title of Judge

July 29, 2014
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 10 months.

☒ The court makes the following recommendations to the Bureau of Prisons:

At the request of defense counsel, the Court recommends that the defendant be designated to an institution in Texas in order to facilitate visitation with his family.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ____ on ____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before ____ on ____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check if applicable)*

☒ The defendant is prohibited from possessing or purchasing a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check if applicable)*

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check if applicable)*

*☒ The defendant shall register as a sex offender, and keep the registration current, in each jurisdiction where the defendant resides, where the defendant is an employee, and where the defendant is a student. For initial registration purposes only, the defendant shall also register in the jurisdiction in which convicted, if such

jurisdiction is different from the jurisdiction of residence. Registration shall occur not later than 3 business days after being sentenced, if the defendant is not sentenced to a term of imprisonment. The defendant shall, not later than 3 business days after each change in name, residence, employment, or student status, appear in person in at least one jurisdiction in which the defendant is registered and inform that jurisdiction of all changes in the information required. *(Check if applicable)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check if applicable)*

If this judgment imposes a fine or restitution, it is to be a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer in a manner and frequency directed by the court or the probation officer;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substances or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall successfully participate in a mental health treatment program and/or sex offender treatment program. The defendant shall abide by all program rules, requirements, and conditions of the sex offender treatment program, which may include plethysmograph, polygraph, and visual reaction testing as approved by the Probation Office to assess the defendant's risk level and determine if the defendant is in compliance with the conditions of supervision. The defendant shall contribute to the cost based on the ability to pay.

2. The defendant shall refrain from any unsupervised contact with minors during the term of supervision unless approved by the U.S. Probation Officer.

3. The defendant shall neither possess nor have under his/her control any material that depicts sexually explicit conduct involving adults or minor[s], child pornography, or visual depictions of minor[s] engaged in sexually explicit conduct, all as defined in 18 U.S.C. 2256.

4. As directed by the U.S. Probation Officer, the defendant shall cooperate with and abide by the policies of the United States Probation Office's Computer and Internet Monitoring Program which includes restrictions and/or prohibitions related to: computer and Internet usage, possession and use of electronic, cellular, gaming, and Internet appliance devices; possession and use of computer hardware and software, encryption hardware or software, and accessing certain types of web sites to include: social networking, chat rooms, and those depicting sexually explicit conduct or pornographic material. The defendant will also be subject to computer monitoring, and will provide the United States Probation Office with a complete inventory of all electronic and Internet capable devices, user account information as well as password(s).

5. The defendant shall submit his/her person, house, residence, vehicle(s), papers, business or place of employment and any property under the defendant's control to a search, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that

the premises may be subject to searches pursuant to this condition.

6. The defendant is prohibited from possessing or purchasing a firearm, ammunition, destructive device, or any other dangerous weapon.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the total criminal monetary penalties under the Schedule of Payments set forth in this Judgment.

	Assessment	Fine	Restitution
Totals:	$ 100	None	None

☐ The determination of restitution is deferred until ____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals:	$	$	

☐ Restitution amount ordered pursuant to plea agreement $ __

☐ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options set forth in this Judgment may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

  ☐ the interest requirement is waived for the ☐ fine and/or ☐ restitution.

  ☐ The interest requirement for the [ ] fine and/or ☐ restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ ___ due immediately, balance due

☐ not later than _____ , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D or, ☒ F below); or

C ☐ Payment in monthly installments of not less than 5% of the defendant's monthly gross household income over a period of ____ years to commence ___ days after the date of this judgment; or

D ☐ Payment of not less than 10% of the funds deposited each month into the inmate's trust fund account and monthly installments of not less than 5% of the defendant's monthly gross household income over a period of __ years, to commence __ days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within ___ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

If restitution is ordered, the Clerk, U.S. District Court, may hold and accumulate restitution payments, without distribution, until the amount accumulated is such that the minimum distribution to any restitution victim will not be less than $25.

Payments should be made to the Clerk, U.S. District Court, U.S. Courthouse – Room 259, 500 State Avenue, Kansas City, Kansas 66101.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount Joint and Several Amount and corresponding payee, if appropriate.

Case Number (including Defendant Number)	Defendant Name	Joint and Several Amount

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States. Payment against any money judgment ordered as part of a forfeiture order should be made payable to the United States of America, c/o United States Attorney, Attn: Asset Forfeiture Unit, 1200 Epic Center, 301 N. Main. Wichita, Kansas 67202

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LESTER RAY NICHOLS, Defendant-Appellant.	No. 14-3041

Appeal from the United States District Court for the District of Kansas (D.C. No. 6:13-CR-10106-JTM-1)

(Filed Dec. 30, 2014)

Timothy J. Henry, Assistant Public Defender (Melody Brannon Evans, Federal Public Defender, with him on the briefs), Office of the Federal Public Defender, Wichita, Kansas, for Appellant.

James A. Brown, Assistant United States Attorney (Barry R. Grissom, United States Attorney, with him on the brief), Office of the United States Attorney, Topeka, Kansas, for Appellee.

Before **McHUGH, McKAY,** and **BALDOCK,** Circuit Judges.

McHUGH, Circuit Judge.

I. INTRODUCTION

Lester Nichols is a convicted sex offender who left the United States without updating his status on the federal sex offender registry. He was brought back to the United States and charged with failing to register, in violation of the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250(a). On appeal, he challenges his conviction based on two theories: (1) SORNA's updating requirement does not apply in situations like his where the sex offender moves from a SORNA jurisdiction to a non-SORNA jurisdiction, and (2) SORNA's delegation of authority to the Attorney General to determine SORNA's retroactive application is unconstitutional. We reject both arguments and therefore affirm Mr. Nichols's conviction.

II. BACKGROUND

In 2003, Mr. Nichols was convicted of traveling interstate with the intent to engage in sex with a minor, in violation of 18 U.S.C. § 2423(b). He was sentenced to 120 months imprisonment. Although Mr. Nichols's conviction occurred before SORNA's 2006 enactment, the U.S. Attorney General issued a rule in 2007 extending the requirements of SORNA "to all sex offenders, including sex offenders convicted of the

offense for which registration is required prior to the enactment of that Act." 28 C.F.R. § 72.3. This rule was issued pursuant to the authority Congress delegated to the Attorney General under SORNA. *See* 42 U.S.C. § 16913(d) ("The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter. . . ."). Mr. Nichols, as a preenactment sex offender, is thus required to comply with SORNA's registration requirements.

By 2012, Mr. Nichols had been released from prison and was placed under federal supervision in the District of Kansas. Up until that time, he had complied with both the Kansas and SORNA sex offender registration requirements. In November 2012, Mr. Nichols took a plane from Kansas City to Manila, Philippines, without updating his sex offender registry. One month later, he was arrested by Philippine law enforcement officers and was turned over to State Department custody for deportation to the United States. Mr. Nichols was charged with and indicted for one count of failure to update a registration as required by SORNA. *See* 18 U.S.C. § 2250(a).

Mr. Nichols moved to dismiss the indictment. He argued before the district court that SORNA did not require him to register as a sex offender while he was in the Philippines because, once in the Philippines, he did not reside in a U.S. jurisdiction. Mr. Nichols also contended SORNA's delegation of authority to the Attorney General to determine SORNA's application

to preenactment sex offenders like him is unconstitutional.

The district court rejected Mr. Nichols's first argument in light of *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011), where we held that a defendant violated SORNA when he moved from Utah to Belize without updating his status on the sex offender registry. The district court also rejected Mr. Nichols's nondelegation argument. The court acknowledged the lack of binding Tenth Circuit precedent addressing this issue, but noted our observation in dicta that SORNA's registration provision does not violate the nondelegation doctrine. *United States v. Carel*, 668 F.3d 1211, 1214 (10th Cir. 2011). The district court also looked to *United States v. Rickett*, 535 F. App'x 668 (10th Cir. 2013) (unpublished), wherein we rejected a nondelegation argument under plain error review because, absent controlling precedent, application of SORNA to a preenactment offender was not plainly unconstitutional. Finally, the district court explained that the clear weight of authority from other circuits has rejected nondelegation challenges to 42 U.S.C. § 16913(d). Accordingly, the district court ruled SORNA's delegation of authority under § 16913(d) is not unconstitutional and denied Mr. Nichols's motion to dismiss. Mr. Nichols thereafter entered a conditional guilty plea, reserving the right to appeal both issues. He now does so and we exercise our jurisdiction under 28 U.S.C. § 1291.

III. DISCUSSION

Mr. Nichols appeals both elements of the district court ruling. He first contends SORNA's requirement that an offender keep his registration current does not apply to offenders who change their residence to a non-SORNA jurisdiction. In so arguing, he asks us to overturn our precedent in *United States v. Murphy*, wherein we held, "a sex offender, upon changing his residence, [must] update his registration in a jurisdiction involved . . . even if he did not establish a new residence in a SORNA jurisdiction." 664 F.3d 798, 803 (10th Cir. 2011). Mr. Nichols alternatively argues we should vacate his conviction on the basis that 42 U.S.C. § 16913(d) creates an unconstitutional delegation of authority by permitting the Attorney General to determine SORNA's application to preenactment sex offenders. These issues "involve statutory interpretations of and constitutional challenges to SORNA," which we review de novo, "interpreting the words of the statute in light of the purposes Congress sought to serve." *United States v. Hinckley*, 550 F.3d 926, 928 (10th Cir. 2008) (brackets and internal quotation marks omitted), *abrogated on other grounds by Reynolds v. Unites* [sic] *States*, 132 S. Ct. 975 (2012).

A. Extraterritorial Changes of Residence under SORNA

SORNA requires sex offenders to "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42

U.S.C. § 16913(a). SORNA defines "jurisdiction" as including U.S. states, territories, and Indian reservations, but not foreign nations. *Id.* § 16911(10). It defines "resides" as "the location of the individual's home or other place where the individual habitually lives." *Id.* § 16911(13). When a sex offender has a change of residence, he "keep[s] the registration current" by "not later than 3 business days after each change of . . . residence . . . appear[ing] in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform[ing] that jurisdiction of all changes in the information required for that offender in the sex offender registry." *Id.* § 16913(c). In regard to his residence, the sex offender must provide for the registry "[t]he address of each residence at which the sex offender resides or will reside." *Id.* § 16914(a)(3). Mr. Nichols argues the plain language of these SORNA provisions indicates that the requirement to "keep the registration current" does not apply to sex offenders who have a change of residence to a non-SORNA jurisdiction.

We squarely addressed this issue in *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011). The defendant in *Murphy* was a registered sex offender who had resided in a correctional facility in Utah, departed from Utah by bus, arrived in California, then took a taxi to Mexico, and ultimately ended up in Belize where he lived for six months. *Id.* at 799-800. Mr. Murphy was deported to the United States and was charged with and convicted of failing to update his sex offender registry, in violation of 18 U.S.C.

§2250(a). *Id.* at 800. On appeal, Mr. Murphy challenged his conviction on the basis that he had no obligation to update his registration after he left a SORNA jurisdiction for a non-SORNA jurisdiction. *Id.*

We affirmed Mr. Murphy's conviction, interpreting SORNA otherwise. We interpreted the phrase "jurisdiction where the offender resides" from § 16913(a) and term "residence" as used in § 16913(c) as two different concepts – the former meaning "the state where the individual keeps his home or habitually lives" and the latter meaning "a specific dwelling place . . . where an offender habitually lives." *Id.* at 800-801. And we concluded the two terms trigger different obligations: "the offender's jurisdiction is where he must keep his registration current, while the offender's residence is a specific piece of registry information, a change of which sparks a reporting duty." *Id.* at 801.

From this interpretation, we drew three conclusions. First, "abandoning one's living place constitutes a change in residence under SORNA." *Id.* Second, "[w]hen an offender leaves a residence in a state, and then leaves the state entirely, that state remains a jurisdiction involved." *Id.* at 803. And third, "a reporting obligation does not disappear simply because an individual manages to relocate to a non-SORNA jurisdiction before the three-day deadline for updating a registration has passed." *Id.* Applying this interpretation to Mr. Murphy's case, we ruled, "a legal obligation to update his registration attached" when Mr. Murphy left the correctional

facility "while he was still in Utah, and not when he arrived in Belize." *Id.* at 804. And even though Mr. Murphy "was no longer living in Utah when his failure to register became punishable" (i.e., three days after his change of residence), "Utah remained a 'jurisdiction involved' under SORNA because it was his current jurisdiction when the reporting obligation arose." *Id.* We therefore affirmed his conviction for failure to register under § 2250(a).

Earlier this year we reaffirmed *Murphy*'s interpretation of SORNA. *United States v. Lewis*, 768 F.3d 1086, 1091-92 (10th Cir. 2014). We explained in *Lewis* that "*Murphy*'s logic [is] controlling" and concluded, "The effect of *Murphy*'s holding is that the abandonment of a permanent residence triggers a sex offender's obligation to update his registration" and "the departure district remains a 'jurisdiction involved' even after the sex offender has left the state." *Id.*

Mr. Nichols contends that *Murphy* misinterpreted SORNA and we should therefore overturn it. In so arguing, Mr. Nichols relies primarily on three sources: (1) Judge Lucero's dissenting opinion in *Murphy*, 664 F. 3d at 806, which asserted that the majority "impermissibly rejects the statutory definition of 'resides'. . . . [and] avoids a plain text reading of the statute by giving two different meanings to the defined term 'resides'"; (2) the Eighth Circuit's opinion in *United States v. Lunsford*, 725 F.3d 859, 862 (8th Cir. 2013), which disagreed with *Murphy*'s interpretation of SORNA; and (3) the U.S. Supreme Court's decision in *Carr v. United States*, 560 U.S. 438, 447-49

(2010), which looked to the plain language of § 2250 and concluded Congress's use of present tense verbs "strongly supports a forward-looking construction" and therefore the elements of § 2250 must be met sequentially for a violation to occur.

Regardless of the merits of these arguments, we are bound by the majority opinion in *Murphy*. Indeed, one panel of this court cannot overrule the judgment of another panel "absent en banc consideration . . . [or] an intervening Supreme Court decision that is contrary to or invalidates our previous analysis." *United States v. Brooks*, 751 F.3d 1204, 1209 (10th Cir. 2014) (internal quotation marks omitted). Neither exception to our horizontal stare decisis rule is present here. Mr. Nichols attempts to characterize *Carr* as the type of contrary Supreme Court authority that would invalidate *Murphy*. But *Carr* was decided before *Murphy* and is therefore not an intervening decision. And although Mr. Nichols correctly notes that *Murphy* did not address the Supreme Court's *Carr* decision, our later *Lewis* decision did, ruling that *Carr* "does not dictate an alternative conclusion" to the conclusion reached in *Murphy*. 768 F.3d at 1091 n.4. *Murphy* is therefore controlling.

Applying *Murphy*'s interpretation of SORNA to this case, we affirm Mr. Nichols's conviction under § 2250(a). By boarding the plane to the Philippines, Mr. Nichols abandoned his residence in Kansas – a "jurisdiction involved." This change in residence triggered a registry obligation in Kansas, which Mr. Nichols did not fulfill. Mr. Nichols therefore violated

§ 2250(a) by failing to update his registry in Kansas within three days of his change in residence.

B. Delegation under SORNA

Mr. Nichols alternatively argues we should vacate his SORNA conviction on the basis that SORNA's delegation of authority to the Attorney General to determine SORNA's preenactment application, 42 U.S.C. § 16913(d), is unconstitutional. Mr. Nichols insists that in applying the nondelegation doctrine to this case, we should apply a heightened "meaningful constraint" standard, instead of the more lenient "intelligible principles" standard, because Congress delegated authority under SORNA that relates to the imposition of criminal liability. We disagree both as to the relevant legal standard and the application of that standard and conclude that § 16913(d) does not violate the nondelegation doctrine.

1. The Nondelegation Doctrine

Under the U.S. Constitution, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. CONST., art. I, § 1. From this language and based on separation of powers principles, the Supreme Court "has derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Government." *Touby v. United States*, 500 U.S. 160, 165 (1991). Nonetheless, Congress may

delegate authority to a different branch, and "[s]o long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (brackets and internal quotation marks omitted). The Supreme Court has further explained that an intelligible principle exists so long as "Congress clearly delineates [1] the general policy, [2] the public agency which is to apply it, and [3] the boundaries of this delegated authority." *Id.* at 372-73.[1]

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[1] Under this standard, the Supreme Court has struck down statutes delegating power to an administrative agency on only two occasions, "one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 474 (2001) (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)). *Panama Refining Co.* and *Schechter Poultry* constitute the "outer limits" of the Supreme Court's nondelegation precedent and demonstrate the Court's reticence "to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Id.* at 474-75 (internal quotation marks omitted); *see also United States v. Rickett*, 535 F. App'x 668, 675 (10th Cir. 2013) (unpublished), *cert. denied*, 134 S. Ct. 1529 (2014) ("[T]he Supreme Court has never expressly overruled *Schechter Poultry* or *Panama Refining;* so the doctrine, even if dead, has never received a proper burial.").

2. Delegation under 42 U.S.C. § 16913(d)

Applying this standard to SORNA, we concluded that § 16913(d) does not violate the nondelegation doctrine. The language of SORNA demonstrates, first, that Congress clearly delineated the general policy upon which SORNA is based. Section 16901 expresses the congressional policy embodied in SORNA: "to protect the public from sex offenders and offenders against children" by establishing "a comprehensive national system for the registration of those offenders." This policy statement conveys the intelligible principles upon which the Attorney General's delegated authority must be based. *See United States v. Kuehl*, 706 F.3d 917, 920 (8th Cir. 2013) (concluding that SORNA's broad policy statement contained in § 16901 is "sufficient to provide an intelligible principle for delegation"); *United States v. Goodwin*, 717 F.3d 511, 516 (7th Cir. 2013) (explaining that § 16901 "provides sufficient guidance to the Attorney General").

Second, Congress clearly delineated "the public agency which is to apply" the authority by specifying the Attorney General as the executive official to whom it delegated authority under SORNA.

Third, Congress also clearly delineated the boundaries of the authority it delegated to the Attorney General. Section 16913(d) delegates to the Attorney General a single, narrow decision: to determine SORNA's application to preenactment sex offenders. Under this delegation, "the Attorney General cannot

do much more than simply determine whether or not SORNA applies to those individuals." *United States v. Guzman*, 591 F.3d 83, 93 (2nd Cir. 2010). This circumscribed question is further "constrained by the legislative determinations that Congress made in other sections of SORNA," including the provisions pronouncing which crimes are subject to SORNA, § 16911, where the offender must register, § 16913(a), the timeframe within which the offender must register, § 16913(b), the method of registration, § 16913(b) – (c), and the information the offender must include in the registry, § 16914(a). *United States v. Cooper*, 750 F.3d 263, 272 (3d Cir.), *cert. denied*, 135 S. Ct. 209 (2014). Congress also explicitly outlined the elements of the failure-to-register crime in § 2250. The authority Congress delegated under § 16913(d) is therefore bounded by the limited nature of the retroactive determination itself and the guidance Congress provided in other SORNA provisions.

Accordingly, we hold that § 16913(d) meets the Supreme Court's intelligible principles test because Congress clearly delineated SORNA's general policy, the public agency to which Congress delegated its authority, and the boundaries of this delegation. *See Mistretta*, 488 U.S. 372-73.

Mr. Nichols asserts, however, that we should apply the more rigorous "meaningfully constrains" standard instead of the "intelligible principle" standard because § 16913(d) delegates Congress's authority to regulate a statute with criminal consequences. In so arguing, Mr. Nichols relies on *Touby v. United*

States, in which the Supreme Court acknowledged the possibility that "something more than an 'intelligible principle' is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions," but declined to resolve the issue because, even under a more stringent standard, the provision at issue in *Touby* "meaningfully constrains the Attorney General's discretion to define criminal conduct." 500 U.S. 160, 165-66 (1991). Mr. Nichols contends that this case is the appropriate vehicle to institute the more searching "meaningfully constrains" standard, and that § 16913(d) fails under that standard.

The Third Circuit recently confronted this issue in *Cooper*, 750 F.3d at 270-71. The *Cooper* court recognized the Supreme Court left open the question whether a heightened "meaningfully constrains" standard applies to Congress's delegation of authority involving statutes with criminal implications. *Id.* at 271. But as the Third Circuit further explained, the meaningful constraints standard "has been referenced in only a handful of cases, none of which set forth factors or a substantive analytical framework against which to assess whether a specific delegation satisfies the standard." *Id.* The Third Circuit therefore refused to invoke the meaningfully constrains standard "[u]ntil the Supreme Court gives us clear guidance to the contrary." *Id.*

We likewise decline to abandon the well-settled "intelligible principle" standard for the undeveloped "meaningfully constrains" standard. And because

Congress provided an intelligible principle to which the Attorney General must conform in exercising the authority delegated under § 16913(d), we join our sister circuits[2] in concluding that § 16913(d) does not violate the nondelegation doctrine.[3]

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[2] *United States v. Cooper*, 750 F.3d 263, 271-72 (3d Cir.), *cert. denied*, 135 S. Ct. 209 (2014); *United States v. Richardson*, 754 F.3d 1143, 1146 (9th Cir. 2014); *United States v. Sampsell*, 541 F. App'x 258, 259-60 (4th Cir. 2013) (unpublished) (per curiam); *United States v. Goodwin*, 717 F.3d 511, 516-17 (7th Cir. 2013); *United States v. Kuehl*, 706 F.3d 917, 919-20 (8th Cir. 2013); *United States v. Parks*, 698 F.3d 1, 7-8 (1st Cir. 2012); *United States v. Felts*, 674 F.3d 599, 606 (6th Cir. 2012); *United States v. Guzman*, 591 F.3d 83, 92-93 (2nd Cir. 2010); *United States v. Whaley*, 577 F.3d 254, 263-64 (5th Cir. 2009); *United States v. Ambert*, 561 F.3d 1202, 1213 (11th Cir. 2009).

[3] We acknowledge the concern some federal judges have expressed with Congress's delegation of such an important question. *See Reynolds v. United States*, 132 S. Ct. 975, 986 (2012) (Scalia, J., dissenting) (opining that § 16913(d)'s delegation of authority to the Attorney General "sail[s] close to the wind with regard to the principle that legislative powers are nondelegable"); *United States v. Hinckley*, 550 F.3d 926, 948 (10th Cir. 2008) (Gorsuch, J., concurring) (applying principles of constitutional avoidance to prevent an interpretation that would allow the Attorney General to choose "willy nilly" between either of "two extremes" or anything in between in determining SORNA's application to preenactment offenders). Although we agree that Congress's delegation of this important decision is puzzling, *see Cooper*, 750 F.3d at 272, we conclude that it nonetheless passes constitutional muster.

IV. CONCLUSION

For these reasons, we AFFIRM Mr. Nichols's conviction for failure to register in violation of 18 U.S.C. § 2250(a).

14-3041, *United States v. Nichols*

McKAY, Circuit Judge, concurring.

I concur with the panel's opinion with regard to the nondelegation doctrine question. I also concur that, under these facts, our decision in *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011), binds us with regard to the application of SORNA, and compels this court to determine that Kansas remained a "jurisdiction involved" under the Act even after Mr. Nichols abandoned his residence there. I write separately to express disagreement with the majority in *Murphy*, agreement with the dissent in *Murphy* by Judge Lucero, and my belief that consideration of this case by the full en banc court would be appropriate.

Judge Lucero's interpretation of SORNA's registration requirements accords with that of the Eighth Circuit in *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013). *Lunsford* held that an individual who abandons a residence in a jurisdiction covered by SORNA to move to a jurisdiction not covered by SORNA no longer resides in a "jurisdiction involved" under the Act and therefore has no obligation to register. *Id.* at 861. I am persuaded by this reading of

SORNA's plain language, however, the majority opinion in *Murphy* currently controls this case, and I accordingly concur.

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LESTER RAY NICHOLS, Defendant-Appellant.	No. 14-3042

ORDER

(Filed Apr. 15, 2015)

Before **BRISCOE**, Chief Judge, **KELLY, LUCERO, HARTZ, TYMKOVICH, GORSUCH, HOLMES, MATHESON, BACHARACH, PHILLIPS, MCHUGH,** and **MORITZ**, Circuit Judges.

This matter is before the court on the appellant's *Petition for Rehearing En Banc.* We also have a response from the government. Upon consideration of the implicit request for panel rehearing contained in the petition, the request is denied by a majority of the original panel members.

The en banc petition was also transmitted to all of the judges of the court who are in regular active service. Upon review, a poll was called, and a majority of the active judges voted to deny the en banc suggestion. Consequently, that request is likewise denied. Judges Lucero, Gorsuch, Matheson and Moritz would grant the en banc petition.

Judges Lucero and Gorsuch have written separately in dissent from the denial of the petition.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

14-3041, United States v. Nichols (Lucero, J., dissenting from the denial of rehearing en banc)

I dissent from the denial of rehearing en banc because a recent Eighth Circuit decision creates a circuit split regarding the applicability of SORNA's notice provisions to offenders who leave the country. *Compare United States v. Lunsford*, 725 F.3d 859, 860 (8th Cir. 2013), *with United States v. Murphy*, 664 F.3d 798, 799 (10th Cir. 2011). I continue to hold the view that *Murphy* was incorrectly decided for the reasons stated in my dissent from that case. *See id.* at 804-08 (Lucero, J., dissenting). Correcting this circuit split is a matter of exceptional importance given the

express purpose of Congress in enacting SORNA to remedy "a wide disparity among State registration requirements and notification obligations for sex offenders." H.R. Rep. No. 109-218(I), at 23 (2005).

The facts of *Lunsford* and this case illustrate why our current jurisprudence runs directly against the stated intent of Congress. In both cases, the appellants moved directly from the Kansas City metropolitan area to the Philippines. Lunsford had lived in the Missouri side of the metropolis and was not required to update his Missouri registration to reflect his move out of the country. *Lunsford*, 725 F.3d at 860. But Nichols, who had lived just across the river in Kansas, was brought back to the United States and sentenced to prison for failing to update his Kansas registration. *United States v. Nichols*, 775 F.3d 1225, 1227 (10th Cir. 2014). We have simply replaced a "wide disparity among State registration requirements" with a wide disparity among Circuit registration requirements. In doing so, we thwart the intent of Congress and needlessly complicate an already complicated law.

Additionally, I agree with Judge Gorsuch that the Constitution demands something more than an "intelligible principle" when Congress delegates its power to define crimes to the executive branch agency charged with prosecuting those crimes. Moreover, I agree that it is questionable whether SORNA even includes an "intelligible principle" to guide the Attorney General's discretion to apply SORNA's provisions

to pre-Act offenders. I would address this issue in en banc rehearing as well.

No. 14-3041, *United States v. Nichols*

GORSUCH, Circuit Judge, dissenting from the denial of rehearing en banc.

A circuit split lingers here. First to approach the question, this circuit interpreted 42 U.S.C. § 16913 as requiring sex offenders to notify authorities if they plan to leave the country. *United States v. Murphy*, 664 F.3d 798, 801-02 (10th Cir. 2011). In a later opinion the Eighth Circuit gave thoughtful consideration to this interpretation of the statute but came to the opposite view. *United States v. Lunsford*, 725 F.3d 859, 861-82 (8th Cir. 2013); *see also Murphy*, 664 F.3d at 805 (Lucero, J., dissenting). In denying rehearing today to reconsider this court's position in light of *Lunsford*'s learning, we leave those who seek a resolution of the circuit split to travel other avenues. *Murphy* and *Lunsford* articulate both sides of the split admirably and there's no need for further amplification here, only resolution somewhere.

Beyond this matter of statutory interpretation, though, lies a constitutional question that deserves more notice. If the separation of powers means anything, it must mean that the prosecutor isn't allowed to define the crimes he gets to enforce. Yet, that's precisely the arrangement the Sex Offender Registration and Notification Act purports to allow in this

case and a great many more like it. In § 16913(d), Congress left it to the Attorney General to decide whether and on what terms sex offenders convicted before the date of SORNA's enactment should be required to register their location or face another criminal conviction. So unusual is this delegation of legislative authority that to find an analogue you might have to look back to the time Congress asked the President to devise a code of "fair competition" for the poultry business – a delegation of legislative authority the Supreme Court unanimously rejected and Justice Cardozo called "unconfined and vagrant," a "delegation running riot." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551, 553 (1935) (Cardozo, J., concurring). Even then you could be excused for thinking the delegation before us a good deal less cooped or caged than that one. After all, it doesn't just grant some alphabet soup agency the power to write rules about the chicken trade. It invests in the nation's chief prosecutor the authority to devise a criminal code governing a half-million people.

When it comes to sex offenders convicted *after* SORNA's enactment, the statute is exquisitely detailed. It divides those persons into three tiers based on the seriousness of their offense. 42 U.S.C. § 16911. It specifies which sex offenses place offenders in which tiers. *Id.* It requires tier I offenders to register their location for 15 years; tier II offenders to do so for 25 years; and tier III offenders to carry on registering for life. *Id.* § 16915. It explains what conditions

merit reducing the registration period. *Id.* § 16915(b)(1). On and on it goes for 22 pages.

But none of this automatically applies to Mr. Lester Nichols and others convicted of sex offenses *before* the Act's passage. Instead, when it comes to past offenders, the Act says just this:

> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for registration of any such sex offender. 42 U.S.C. § 16913(d).

Yes, that's it.

As the government acknowledges, this language leaves the Attorney General free to do nothing: the law "does not require the Attorney General to act within a certain time frame or by a date certain; it does not require him to act at all." Brief for the United States at 23-24, *Reynolds v. United States*, 132 S. Ct. 975 (2012) (No. 10-6549). Alternatively, "[u]nder his delegated authority in Subsection (d), the Attorney General could" require all past offenders to register or "require some but not all to register." *Id.* at 24-25. Or, alternatively still, he could require those forced to register to "comply with some but not all of the registration requirements" applicable to future offenders in order to adapt the law as he thinks best for past offenders. *Id.* After all, the statute grants the Attorney General authority to specify the

applicability not of the Act as a whole, one way or another, but to specify the applicability of each of the various "requirements" contained within the Act – and Congress well knew the difference. *Compare* 42 U.S.C. § 16912(b) (explaining that the Attorney General shall "interpret and implement this subchapter"), *with id.* § 16913(d) (providing the Attorney General authority "to specify the applicability of the requirements of this subchapter"). Even then, the Attorney General remains free to "change his mind at any given time or over the course of different administrations." Brief for the United States, *supra*, at 23-24. Given all this, it's perhaps unsurprising how many circuits and commentators have observed that the degree of discretion invested in the Attorney General here is vast.[1] It is so vast, in fact, that some

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[1] *See, e.g.*, *United States v. Rickett*, 535 F. App'x 668, 673 (10th Cir. 2013) ("As written, § 16913(d) gives the Attorney General discretion to decide whether and how SORNA should be applied retroactively."); *United States v. DeJarnette*, 741 F.3d 971, 981 (9th Cir. 2013) ("[W]e see no reason to assume that the Attorney General was mandated to apply *all* of SORNA's registration requirements to *all* pre-Act offenders."); *United States v. Johnson*, 632 F.3d 912, 923 (5th Cir. 2011) ("This language is not ambiguous. Following the plain meaning rule, this phrase delegates to the Attorney General the decision of whether and how the SORNA registration requirements apply to offenders with pre-enactment convictions."); *United States v. Madera*, 528 F.3d 852, 858 (11th Cir. 2008) ("Subsection (d) granted the Attorney General unfettered discretion to determine both *how* and *whether* SORNA was to be retroactively applied."); *see also* Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 Notre Dame L. Rev. 483, 485 (2014); Reem Sadik,

(Continued on following page)

(including the government itself) once suggested a narrower interpretation of § 16913(d) would make more sense of the statute. *See id.*; *Reynolds*, 132 S. Ct. at 986 (Scalia, J., dissenting).

A majority of the Supreme Court, however, carefully considered and rejected any alternative reading and made plain that, as a matter of statutory interpretation, SORNA's retroactive application hinges on the Attorney General. The Court explained that Congress chose this course as its solution for the many "problems" associated with trying "to apply [SORNA's] registration requirements to pre-Act offenders" who were at the time subject to a "patchwork of preexisting state systems." *Reynolds*, 132 S. Ct. at 981. The power delegated to the Attorney General, the Court said, is sort of like a directive telling the Commissioner of Major League Baseball that he has "the authority to specify the applicability" of a stringent minor league drug testing policy to major league players: "we should think that the minor league policy would not apply unless and until the Commissioner so specified" whether and how it should be applied to meet the needs of a similar but different league. *Id.* As written, the statute demonstrates Congress thought that past offenders could "warrant[ ] different federal registration treatment" than future offenders. *Id.* Even among pre-Act offenders, the statute contemplates the possibility of "different federal

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Comment, *Passing the Torch but Sailing too Close to the Wind*, 6 Legis. & Pol'y Brief 295, 298 (2014).

registration treatment of different categories of pre-Act offenders." *Id.* In short, Congress thought it a "desirable solution" to ask "the Department of Justice . . . to examine these pre-Act offender problems" and specify "new registration requirements" for them. *Id.*

The Court acknowledged that a statute investing so much authority in the Attorney General inevitably raises with it separation of powers questions. But, the Court said, it would leave those questions for another day. *Id.* Justices Scalia and Ginsburg went further, expressing concern that the law "sail[s] close to the wind." *Id.* at 986 (Scalia, J., dissenting). The day to decide the constitutional question the Court left open is now upon us. And, as it turns out, the statute doesn't just sail close to the wind. It sails right into it.

Article I § 1 provides that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. Many times over and in cases stretching back to the founding the Supreme Court has held that this language limits the ability of Congress to delegate its legislative power to the Executive. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001). There's ample evidence, too, that the framers of the Constitution thought the compartmentalization of legislative power not just a tool of good government or necessary to protect the authority of Congress from encroachment by the Executive but essential to the preservation of the people's liberty. As Madison put it, "[n]o political truth is . . . stamped with the authority of more enlightened patrons of liberty" than the separation of powers

because "[t]he accumulation of all powers, legislative, executive, and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 298 (James Madison) (Clinton Rossiter ed., 1961). By separating the lawmaking and law enforcement functions, the framers sought to thwart the ability of an individual or group to exercise arbitrary or absolute power. And by restricting lawmaking to one branch and forcing any legislation to endure bicameralism and presentment, the framers sought to make the task of lawmaking more arduous still. These structural impediments to lawmaking were no bugs in the system but the point of the design: a deliberate and jealous effort to preserve room for individual liberty. *See, e.g.*, *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring) ("The principle that Congress cannot delegate away its vested power exists to protect liberty.").

Without a doubt, the framers' concerns about the delegation of legislative power had a great deal to do with the criminal law. The framers worried that placing the power to legislate, prosecute, and jail in the hands of the Executive would invite the sort of tyranny they experienced at the hands of a whimsical king. Their endorsement of the separation of powers was predicated on the view that "[t]he inefficiency associated with [it] serves a valuable" liberty-preserving "function, and, in the context of criminal law, no other mechanism provides a substitute." Rachel E. Barkow,

Separation of Powers and the Criminal Law, 58 Stan. L. Rev. 989, 1011-17, 1031 (2006).

So it is that "to abandon openly the nondelegation doctrine [would be] to abandon openly a substantial portion of the foundation of American representative government." Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 332 (2002). Neither is it so much that bureaucrats might do a "bad job as our effective legislators" as that "they are neither elected nor reelected, and are controlled only spasmodically by officials who are." John Hart Ely, *Democracy and Distrust* 131 (1980).[2]

Of course all this invites the question: how do you know an impermissible delegation of legislative authority when you see it? By its own telling, the

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[2] For other excellent works along these and related lines, see Philip Hamburger, *Is Administrative Law Unlawful?* 377 (2014); Bogdan Iancu, *Legislative Delegation: The Erosion of Normative Limits in Modern Constitutionalism* 222 (2012); Martin Redish, *The Constitution as Political Structure* 16 (1995); David Schoenbrod, *Power Without Responsibility* 181 (1993); Ernest Gellhorn, *Returning to First Principles*, 36 Am. U. L. Rev. 345, 352 (1987); Paul Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines, 40 Law & Contemp. Probs.* 46, 49-65 (1976); Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 Cardozo L. Rev. 807, 822 (1999); Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 Colum. L. Rev. 1119, 1127-30 (1977); Bernard Schwartz, *Of Administrators and Philosopher-Kings: The Republic, The Laws, and Delegations of Power*, 72 Nw. U. L. Rev. 443, 457 (1978); Nadine Strossen, *Delegation as a Threat to Liberty*, 20 Cardozo L. Rev. 861, 861 (1999).

Court has had a hard time devising a satisfying answer. *See, e.g.*, *Wayman v. Southard*, 23 U.S. (10 Wheat) 1, 42 (1825) ("[T]he precise boundary of this power is a subject of delicate and difficult inquiry. . . ."). But the difficulty of the inquiry doesn't mean it isn't worth the effort. After all, at stake here isn't just the balance of power between the political branches who might be assumed capable of fighting it out among themselves. At stake is the principle that the scope of individual liberty may be reduced only according to the deliberately difficult processes prescribed by the Constitution, a principle that may not be fully vindicated without the intervention of the courts. And "[a]bdication of responsibility is not part of the constitutional design." *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).[3]

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[3] *See also, e.g.*, *Ass'n of Am. Railroads*, 135 S. Ct. at 1237 (Alito, J., concurring) ("[T]he inherent difficulty of line-drawing is no excuse for not enforcing the Constitution."); *id.* at 1246 (Thomas, J., concurring in the judgment) (explaining that enforcing the separation of powers "is no less important for its difficulty"); Louis L. Jaffe, *An Essay on Delegation of Legislative Power*, 47 Colum. L. Rev. 561, 577 (1947) ("[N]early every doctrine of constitutional limitation has been attacked as vague. Essentially the charges go to the institution of judicial review as we have it rather than specifically to the delegation doctrine."); Antonin Scalia, *A Note on the Benzene Case*, Reg., July-Aug. 1980, at 25, 28 ("So even with all its Frankenstein-like warts, knobs, and (concededly) dangers, the unconstitutional delegation doctrine is worth hewing from the ice.").

Besides, putting the pieces together it turns out we do know a few things.

We know, for example, that Congress can leave "details" to the Executive. Congress can't punt to the President the job of devising a competition code for the chicken industry. *Schechter Poultry*, 295 U.S. at 531. Such widely applicable rules governing private conduct must be enacted by the Legislature. But once Congress enacts a detailed statutory scheme on its own – once it says, for example, that margarine manufacturers must pay a tax and place a stamp on their packages showing the tax has been paid – Congress may leave to the President "details" like designing an appropriate tax stamp. *In re Kollock*, 165 U.S. 526, 533 (1897); *see also, e.g., Currin v. Wallace*, 306 U.S. 1, 15 (1939); *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932).

Of course, defining what qualifies as a detail is itself no detail. But whether or not something fairly denominated a detail is involved, we also know Congress may pass legislation the operation of which is conditioned on a factual finding by the President. So, for example, Congress may direct the President to lift a statutorily imposed trade embargo against Great Britain if he determines as a factual matter that it is no longer violating the United States's neutrality. *See Cargo of the Brig Aurora v. United States,* 11 U.S. 382, 388 (1813); *see also, e.g., Marshall Field & Co. v. Clark*, 143 U.S. 649, 692-93 (1892). That's clearly no trivial question the President may answer. But

answer it he may so long as a clear legislative consequence follows from his factual finding.

While these are the most traditional delegation tests – is it a detail? do we have a clear legislative consequence hinging on a factual finding? – in more recent times the Court has gone further, allowing legislation to stand so long as it contains an "intelligible principle" to guide the exercise of Executive discretion. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). How intelligible the "intelligible principle" must be to pass muster is much debated.[4] But we know, by way of example, that Congress may ask the EPA to set national air quality standards which are "requisite to protect the public health" subject to "an adequate margin of safety" because, as used in the statute, the term "requisite" demands a standard neither higher nor lower than necessary to meet the legislatively directed objective of protecting the public health with an adequate margin of safety. *Whitman*, 531 U.S. at 473, 476.

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[4] *See, e.g.*, *Ass'n of Am. Railroads*, 135 S. Ct. at 1246 (Thomas, J., concurring in the judgment); *Mistretta v. United States*, 488 U.S. 361, 415-17 (1989) (Scalia, J., dissenting); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223, 1224 (1985) ("Since the early part of this century, the Court has said in essence that a statute may be vague so long as it is either not too vague or no vaguer than necessary."); Lawson, *supra*, at 329 (asserting that the Court has "found intelligible principles where less discerning readers find gibberish"); *see also supra* n.2 (additional authorities discussing this question).

Still, the Court has never expressly held that an intelligible principle alone suffices to save a putative delegation when the criminal law is involved. *See Touby*, 500 U.S. at 165-66. To be sure, the Court has applied the intelligible principle test to regulations that may be enforceable through criminal penalties. *See, e.g., United States v. O'Hagan*, 521 U.S. 642, 695 n.10 (1997); *Yakus v. United States*, 321 U.S. 421, 424-25 (1944). But the Court hasn't endorsed the test in anything like the situation we face – legislation leaving it to the nation's top prosecutor to specify whether and how a federal criminal law should be applied to a class of a half-million individuals. In fact, the Court has repeatedly and long suggested that in the criminal context Congress must provide more "meaningful[ ]" guidance than an "intelligible principle." *Touby*, 500 U.S. at 166; *Fahey v. Mallonee*, 332 U.S. 245, 249-50 (1947); *see also, e.g., United States v. Robel*, 389 U.S. 258, 272-73 (1967) (Brennan, J., concurring); *Barenblatt v. United States*, 360 U.S. 109, 140 n.7 (1959) (Black, J., dissenting); *cf. United States v. Grimaud*, 220 U.S. 506, 517 (1911); *United States v. Eaton*, 144 U.S. 677, 687-88 (1892).

It's easy enough to see why a stricter rule would apply in the criminal arena. The criminal conviction and sentence represent the ultimate intrusions on personal liberty and carry with them the stigma of the community's collective condemnation – something quite different than holding someone liable for a money judgment because he turns out to be the lowest cost avoider. *See, e.g.*, Henry M. Hart, Jr., *The*

Aims of the Criminal Law, 23 Law & Contemp. Prob. 401, 404 (1958); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. Contemp. Legal Issues 1, 26 (1996). Indeed, the law routinely demands clearer legislative direction in the criminal context than it does in the civil and it would hardly be odd to think it might do the same here. *See, e.g.*, *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., statement respecting the denial of certiorari). When it comes to legislative delegations we've seen, too, that the framers' attention to the separation of powers was driven by a particular concern about individual liberty and even more especially by a fear of endowing one set of hands with the power to create and enforce criminal sanctions. And might not that concern take on special prominence today, in an age when federal law contains so many crimes – and so many created by executive regulation – that scholars no longer try to keep count and actually debate their number? *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991) (estimating that over 300,000 federal criminal regulations are on the books).

Recently, the Supreme Court has suggested what a more "meaningful" standard might look like in the criminal context. *See Touby*, 500 U.S. at 166-67. Its discussion came in the course of a challenge to the Controlled Substances Act – legislation permitting the Attorney General to schedule various drugs as controlled substances, rendering their possession by

unauthorized persons illegal. The Court allowed the law to stand, but instead of applying the intelligible principle test alone it proceeded to stress the presence and importance of certain specific statutory features. First, the Court explained, to schedule a drug as a controlled substance the Executive had to find that the drug posed an "imminent hazard" to public safety. *Id.* at 166. Second, when making that determination, the Court noted, the Executive had to consider the drug's "history and current pattern of abuse," "[t]he scope, duration, and significance of abuse," and "[w]hat, if any, risk there is to the public health." *Id.* Third, the law required a further factual finding that the drug in question "has a high potential for abuse," "has no currently accepted medical use in treatment in the United States," and "[t]here is a lack of accepted safety for use of the drug . . . under medical supervision." *Id.* at 167.

Here we see strains of a more traditional delegation jurisprudence, one permitting Congress to enact rules the operation of which is premised on the Executive's factual findings. Indeed, distilling *Touby* to its essence, at least three "meaningful" limitations emerge: (1) Congress must set forth a clear and generally applicable rule (unauthorized persons may not possess the drug) that (2) hinges on a factual determination by the Executive (does the drug pose an imminent hazard?) and (3) the statute provides criteria the Executive must employ when making its finding (does the drug in question currently have an accepted medical use?). These three criteria could easily be

applied to most any delegation challenge in the criminal context and provide the more meaningful standard the Court has long sought. In fact, since *Touby* a number of courts of appeals have employed something very much like them when assessing delegation challenges to federal criminal statutes. *See United States v. Amirnazmi*, 645 F.3d 564, 576-77 (3d Cir. 2011); *United States v. Dhafir*, 461 F.3d 211, 216-17 (2d Cir. 2006); *United States v. Arch Trading Co.*, 987 F.2d 1087, 1093-94 (4th Cir. 1993).

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With that much guidance about delegation doctrine in hand, a few things come clear when we return to the statute before us. For one, it's easy enough to see the similarities between our case and *Schechter Poultry* where the Court held Article I violated. Here as there Congress pointed to a problem that needed fixing and more or less told the Executive to go forth and figure it out. Meanwhile, it's hard to see how ours might be likened to any of the cases turning away delegation challenges.

True, some might try to pass off the question of SORNA's applicability to past offenders as a mere "detail." But the statute before us leaves the Attorney General with "unfettered discretion to determine both *how* and *whether* SORNA [is] to be retroactively applied" to a half-million individuals under threat of criminal prosecution from his own deputies. *Madera*, 528 F.3d at 858. And however far you want to bend the boundaries of what qualifies as a "detail" it's hard

to see how that might qualify. Our case just isn't anything like your grandfather's tax stamp challenge.

Fair enough, some might respond, but sex offenders are so unpopular that there's little chance an Attorney General would do anything other than apply SORNA retroactively to the fullest extent possible. Maybe there is no legislative mandate – conditional or otherwise – requiring him to follow this course, but there might as well be. A reply along these lines seems a likely enough answer to the question what a politically attuned Attorney General would do when the hot potato is passed his way. But it also seems an unlikely answer to the question whether Congress may constitutionally pass the potato in the first place. After all, in a delegation challenge the question isn't whether the Executive is likely to exercise the delegation in one way or another but whether Congress is empowered to delegate the decision at all. *See Whitman*, 531 U.S. at 472-73 ("The very choice of which portion of the power to exercise . . . would *itself* be an exercise of the forbidden legislative authority."). Indeed, the logic at play here would serve to ensconce even the most extreme and obviously unconstitutional delegations only because of a judicial intuition about contemporary political pressures. And not only do unelected judges make for notoriously poor political pundits: ours is supposed to be an independent judiciary making decisions on the legal merits without respect to the vagaries of shifting political winds.

Others still might claim an "intelligible principle" can be rummaged out of SORNA's preamble – a provision that expresses Congress's wish to "protect the public from sex offenders and offenders against children" by establishing "a comprehensive national system for the registration of those offenders." 42 U.S.C. § 16901. But Supreme Court cases rejecting delegation challenges on intelligible principle grounds don't usually rest on policy objectives voiced in a statute's preamble. *See, e.g.*, *Panama Refining Co. v. Ryan*, 293 U.S. 388, 417-19 (1935) (finding a statute's general policy statement insufficient because the "general outline of policy contains nothing as to the circumstances or conditions in which" the delegation should be exercised, *id.* at 417). To be sure, the Court has sometimes gone so far as to suggest that Congress need only "clearly delineate[] the general policy" to guide an agency's conduct. *Mistretta*, 488 U.S. at 372-73. But this language usually seems to cover situations in which the legislative grant of discretion is tied to specific statutory provisions that expressly direct the exercise of that discretion. *See, e.g.*, *id.* at 375-76 (containing a direct link between discretion and direction); *Yakus*, 321 U.S. at 420-21 (same). Even in *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), perhaps one of the most ambitious uses of the intelligible principle test, the Court interpreted the statute granting the Executive discretion to regulate radio in the "public interest" as requiring him to exercise that discretion in ways that "encourage the larger and more effective use of radio." *Id.* at 216. Meanwhile, no comparable guidance exists

here for § 16913(d) "specifie[s] no governing standard whatsoever." Calabresi & Lawson, *supra* n.1, at 485.

Requiring a direct statutory link between discretion and direction makes sense too. After all, as the Court has acknowledged in recent years, it is most assuredly wrong to assume that "whatever" seems to further a "statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (emphasis omitted). Legislation is the art of compromise and few (if any) statutes pursue a single preambulatory purpose without condition, subtlety, or exception. *Id.* at 525-26; *see also United States v. Rentz*, 777 F.3d 1105, 1113 (10th Cir. 2015) (en banc); John F. Manning, *What Divides Textualists from Purposivists?*, 106 Colum. L. Rev. 70, 104 (2006). For precisely these reasons, when it comes to the business of statutory interpretation it is usually the more specific and not the more general or aspirational direction that controls. *See, e.g.*, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976).

Our case illustrates the point. SORNA's prefatory provision expressing the desire to protect children and create a nationwide registration requirement hardly establishes that the statute meant to do so always and in every particular without exception or at any cost. In fact, SORNA is replete with examples of compromise even when it comes to future offenders. Congress indicated that some future offenders may be exempt from its registration requirements if they committed certain kinds of sex offenses but not others. 42 U.S.C. § 16911(5)(C), (7)(A), (7)(B), (8).

Registration is required for life for some offenders but lesser periods for others. *Id.* § 16915(a). These periods can be reduced on good behavior. *Id.* § 16915(b)(1). In these circumstances, it would seem strange to suppose that the statute's prefatory statement of purpose – or, for that matter, provisions of the law discussing the treatment of future offenders – provides intelligible guidance for the Attorney General's treatment of past offenders. Especially when Congress went on to address past offenders specifically, exempted them from the automatic application of any of the statute's registration requirements, and left their treatment to the Attorney General.

Separately but relatedly, the Supreme Court has instructed that under the intelligible principle test "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman*, 531 U.S. at 475. Faint echos of detail doctrine can be found here: less direction may be required when Congress leaves it to the Executive to define what constitutes a "country elevator[ ]" and more may be required when Congress seeks to endow the Executive with the power to create regulations that affect the national economy. *Id.* So even assuming that a preamble detached from the provision granting discretion to the Executive might suffice to supply an intelligible principle in some circumstances, it certainly won't always. And once again it's hard to see how the discretion conferred here is anything less than extraordinary – in its breadth (allowing the Attorney General to apply

none, some, or all of SORNA's requirements to none, some, or all past offenders), in its subject matter (effectively defining a new crime), in its chosen delegate (the nation's top prosecutor), and in the number of people affected (half a million). All factors suggesting more, not less, guidance is required.

Neither is it any answer to say that, though the Attorney General wants for any intelligible principle to guide him in deciding which requirements to impose on which past offenders, at least his discretion finds some boundaries in the statute (he cannot exceed the full application of all of SORNA's requirements). Delegation doctrine teaches that Congress must set *both* the "boundaries" of the Executive's discretion *and* supply an "intelligible principle" for the exercise of that discretion within those boundaries. *Mistretta*, 488 U.S. at 372-73. After all and again, the point of the delegation doctrine isn't so much that some poor Executive agent tasked with the thankless job will necessarily perform poorly within the bounds and metes of the discretion set for him. It is that decoupling the exercise of his discretion so much from legislative direction deprives the people of the structural protections guaranteed by the first section of the first article of the Constitution.

There remains much less room still for debate about the proper outcome of this case when the "intelligible principle" test gives way to a more "meaningful" one in the criminal setting. After all, SORNA's delegation contains none of the three factors that *Touby* found reassuring and that circuit courts have

since used to assess delegation challenges in the criminal context. First, the statute provides no generally applicable rule for past offenders for the Attorney General to follow contingent only on specified factual findings. Rather, the Attorney General may apply all, some or none of the requirements of the Act however he sees fit. Second, the statute requires no factual findings of the Attorney General of any kind. Third, it offers no guidance about these non-existent factual findings.

To be sure, Congress could have easily written a statute with such constraints, and to remedy the delegation problem here it might still. For example, Congress could have tasked the Attorney General with the job of determining what factors correlate with recidivism or present an unreasonable danger to the public and make his determinations based on those considerations. When deciding which past offenders should be required to register Congress could have required the Attorney General to examine, as well, factors like the recency of the violation; the nature of the sex offense; the number of past violations; the offender's age, family, residential, or occupational circumstances; or the offender's mental or physical health – or banned consideration of any of these factors. It's easy to imagine all sorts of ways Congress might have constrained – and might still constrain – the Attorney General's discretion in ways parallel to *Touby*. But and by the government's own admission, we have nothing of the kind here. And that leaves us well outside the ballpark when it

comes to satisfying *Touby*'s test. Indeed, you might wonder if we are even on Yawkey Way. *See* Sadik, *supra* n.1, at 298 (arguing that SORNA fails *Touby*'s test).

Delegation doctrine may not be the easiest to tease out and it has been some time since the Court has held a statute to cross the line. But it has also been some time since the courts have encountered a statute like this one – one that, if allowed to stand, would require the Judiciary to endorse the notion that Congress may effectively pass off to the prosecutor the job of defining the very crime he is responsible for enforcing. By any plausible measure we might apply that is a delegation run riot, a result inimical to the people's liberty and our constitutional design.

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136 S.Ct. 445
Supreme Court of the United States

Lester Ray NICHOLS, petitioner,

v.

UNITED STATES.

No. 15-5238. | Nov. 6, 2015.

Case below, 775 F.3d 1225.

Opinion

Motion of petitioner for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit granted limited to Question 1 presented by the petition.

No. 15-5238

In The
Supreme Court of the United States

LESTER RAY NICHOLS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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QUESTION PRESENTED

The Sex Offender Registration and Notification Act ("SORNA") requires a sex offender who changes his residence to appear in person to register or keep his registration current not later than three business days after the change of residence in at least one jurisdiction where the offender presently resides, works, or attends school. A foreign country is not a jurisdiction under SORNA. 42 U.S.C. §§ 16911(10) & 16913(a), (c).

A federal sex offender who is required to register under SORNA and who knowingly fails to register or update his registration as required by SORNA violates 18 U.S.C. § 2250(a).

The question presented is:

Whether it is a federal crime under 18 U.S.C. § 2250(a) for a registered sex offender who moves from the United States to a foreign country to fail to update his registration with this change of residence in his former jurisdiction within the United States.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Statutory Background	3
B. Factual Background	14
C. Proceedings in the District Court	14
D. Proceedings in the Court of Appeals	15
SUMMARY OF THE ARGUMENT	18
ARGUMENT	22
I. The plain meaning of § 16913 does not require a sex offender who moves to a foreign country to keep his registration current in his former jurisdiction	22
A. Congress used present tense verbs to define the jurisdictions where an offender must register and keep the registration current	23
B. Congress also defined "resides" in the present tense and with reference to the location of an individual's home or similar place	25

TABLE OF CONTENTS – Continued

Page

C. A sex offender must update changes of residence, employment, and student status "in person" in at least one jurisdiction where the offender resides, works, or attends school 31

D. A sex offender has three business days after a change of residence to keep his registration current in the jurisdiction where he presently resides 33

E. A sex offender who changes his residence must update a registration with "current" information, not past or future information 37

F. A foreign country is not a SORNA jurisdiction 40

II. SORNA's statutory context, purpose, and history confirm that a sex offender who moves to a foreign country need not register or keep his registration current in a former jurisdiction within the United States 42

A. SORNA does not expressly regulate offenders who leave the United States 42

B. A requirement that an offender notify his former jurisdiction that he has moved to a foreign country would not meaningfully advance SORNA's purposes 47

TABLE OF CONTENTS – Continued

Page

C. SORNA's statutory history confirms that SORNA does not require an offender to register or keep a registration current in a former jurisdiction when the offender moves to a foreign country, and, to the extent that this supplemental requirement exists, it is enforced by the states, not the federal government 52

1. Unlike the Wetterling Act as amended, SORNA does not require a sex offender to report a change of residence to the jurisdiction "the person is leaving" 52

2. Any departure notification requirement is a supplemental requirement enforced by the states, and not one "required by" SORNA..... 56

III. Any ambiguity in the statute must be resolved in favor of Mr. Nichols 59

CONCLUSION 63

APPENDIX

Statutory Appendix 1a

TABLE OF AUTHORITIES

Page

CASES

Barber v. Thomas, 560 U.S. 474 (2010) 36

Bates v. United States, 522 U.S. 23 (1997) 43

Carr v. United States, 560 U.S. 438 (2010).....*passim*

Chevron USA Inc. v. Nat. Resources Defense Council, Inc., 467 U.S. 837 (1984).....46

Connecticut Nat. Bank v. Germain, 503 U.S. 249 (1992).....36

Davis v. Michigan Dep't of Treasury, 489 U.S. 803 (1989).....42

Dean v. United States, 556 U.S. 568 (2009).....22, 26

EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991).....40

Hamdan v. Rumsfeld, 548 U.S. 557 (2006) 55

Iselin v. United States, 270 U.S. 245 (1926) 43

Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1 (2011).....42

Liparota v. United States, 471 U.S. 419 (1985).....60

Lorillard v. Pons, 434 U.S. 575 (1978).....59

McBoyle v. United States, 283 U.S. 25 (1931) 61

Meghrig v. KFC Western, Inc., 516 U.S. 479 (1996).....55

Otte v. United States, 419 U.S. 43 (1974) 24

Reynolds v. United States, 132 S.Ct. 975 (2012).....8, 33, 46, 58

TABLE OF AUTHORITIES – Continued

Page

Smith v. Doe, 538 U.S. 84 (2003) 4

United States v. Bass, 404 U.S. 336 (1971).....61, 62

United States v. Butler, 297 U.S. 1 (1936).....44

United States v. Granderson, 511 U.S. 39 (1994).....60

United States v. Kebodeaux, 133 S.Ct. 2496 (2013).....*passim*

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United States v. Valle, ___ F.3d ___, 2015 WL 7774548 (2d Cir. Dec. 3, 2015).....60

United States v. Wilson, 503 U.S. 329 (1992) 23

United States v. Wiltberger, 18 U.S. 76 (1820) 61

Yates v. United States, 135 S.Ct. 1074 (2015).....60

STATUTES

15 U.S.C. § 4305 34

18 U.S.C. § 2250 .....*passim*

18 U.S.C. § 2250(a).....*passim*

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 2250(a)(2)(A) 10
18 U.S.C. § 2250(a)(2)(B) 11, 24, 43, 44, 45
18 U.S.C. § 2250(a)(3) 45
18 U.S.C. § 2250(c) 11
18 U.S.C. § 2423 14
22 U.S.C. § 211a 50
28 U.S.C. § 1254(1) 1
42 U.S.C. § 14071 (1994) 4, 56
42 U.S.C. § 14071(a) (1994) 52, 53
42 U.S.C. § 14071(a)(1) (1994) 4
42 U.S.C. § 14071(b) (1994) 4
42 U.S.C. § 14071(b)(5) (1994) 8, 52, 53, 55
42 U.S.C. § 14071(b)(5) (1998) ..... *passim*
42 U.S.C. § 14071(d) (1994) 4, 5, 6, 56, 57
42 U.S.C. § 14072 ..... 4, 56
42 U.S.C. § 14072(b) (2000) 5
42 U.S.C. § 14072(g) (2000) 5
42 U.S.C. § 14072(g)(3) (2000) 8, 52, 53, 57
42 U.S.C. § 14072(g)(4) (2000) 5, 53, 57
42 U.S.C. § 14072(g)(5) (2000) 5, 53, 57
42 U.S.C. § 14072(i) (1996) 5, 56
42 U.S.C. § 14072(i)(3) (2000) 8, 52, 53, 57
42 U.S.C. § 14072(i)(4) (2000) 8, 52, 53, 57

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 16901 ..... *passim*
42 U.S.C. § 16911 2
42 U.S.C. § 16911(10) ..... *passim*
42 U.S.C. § 16911(13) ..... *passim*
42 U.S.C. § 16912(b) 11
42 U.S.C. § 16913 ..... *passim*
42 U.S.C. § 16913(a) ..... *passim*
42 U.S.C. § 16913(b)(2) 35
42 U.S.C. § 16913(c) ..... *passim*
42 U.S.C. § 16913(e) 10, 57
42 U.S.C. § 16914 ..... 13, 38, 45
42 U.S.C. § 16914(a)(3) 38
42 U.S.C. § 16915a 55
42 U.S.C. § 16915b 55
42 U.S.C. § 16916 31
42 U.S.C. § 16918(a) 10
42 U.S.C. § 16919 38
42 U.S.C. § 16919(a) 9
42 U.S.C. § 16919(b) 56
42 U.S.C. § 16921 38
42 U.S.C. § 16921(b)(1) 9, 57
42 U.S.C. § 16921(b)(2) 57
42 U.S.C. § 16921(b)(3) 9, 53, 57

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 16925 8

42 U.S.C. § 16928 ..... *passim*

42 U.S.C. § 16928a 55, 56

49 U.S.C. § 31134(d) 34

Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, Tit. 1, 120 Stat. 587 (2006) 7, 43

Ala. Code § 15-20-23(a) (2005) 6

Alaska Stat. § 12.63.010(c) (1998) 6

Ariz. Rev. Stat. § 13-3822(B) (2005) 6

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TABLE OF AUTHORITIES – Continued

Page

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Ky. Rev. Stat. Ann. § 17.510(10)(b)(1) (2000).....6

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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Page

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OPINIONS BELOW

The opinion of the court of appeals affirming Mr. Nichols's conviction is published at 775 F.3d 1225 (10th Cir. 2014). J.A. 117. The opinion denying rehearing en banc is published at 784 F.3d 666 (10th Cir. 2015). J.A. 134. The district court's order denying Mr. Nichols's motion to dismiss the indictment is unpublished. J.A. 54.

JURISDICTION

The court of appeals entered judgment on December 30, 2014, and denied a timely petition for rehearing en banc on April 15, 2015. J.A. 134. Mr. Nichols filed a timely petition for writ of certiorari on July 14, 2015. This Court granted the petition, limited to Question 1, on November 6, 2015. J.A. 159. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns a prosecution under 18 U.S.C. § 2250. The full text of § 2250 is reproduced in the statutory appendix annexed to this brief. The statutory appendix also includes four other relevant provisions from the Sex Offender Registration and Notification Act:

42 U.S.C. § 16901 (Declaration of purpose)

42 U.S.C. § 16911 (Relevant definitions)

42 U.S.C. § 16913 (Registry requirements for sex offenders)

42 U.S.C. § 16928 (Registration of sex offenders entering the United States)

STATEMENT OF THE CASE

In 2006, Congress enacted the Sex Offender Registration and Notification Act ("SORNA"), Pub. L. No. 109-248, Tit. I, 120 Stat. 590 (42 U.S.C. § 16901 *et seq.*). SORNA requires a sex offender to register, and to keep the registration current, in at least one jurisdiction where the offender resides, works, or attends school. 42 U.S.C. § 16913(a). If a sex offender changes his residence, SORNA requires the offender, not later than three business days after the change of residence, to appear in person in at least one jurisdiction involved and to inform the jurisdiction of the change of residence. 42 U.S.C. § 16913(c). An "involved" jurisdiction is one where the offender resides, works, or attends school. *Id.* (cross-referencing 42 U.S.C. § 16913(a)). A foreign country, however, is not a covered jurisdiction under SORNA. 42 U.S.C. § 16911(10).

SORNA is designed to track sex offenders who live in the United States. *See, e.g.*, 42 U.S.C. § 16901 (establishing a "national" sex offender registry); *Carr*

v. United States, 560 U.S. 438, 454 (2010) (linking the problem of "missing" offenders to "interstate travel"). Consistent with this design, sex offenders who enter the United States are subject to SORNA's provisions. 42 U.S.C. § 16928. No similar provision addresses SORNA's application to offenders who leave the United States.

Below, the Tenth Circuit nonetheless held that Mr. Nichols violated 18 U.S.C. § 2250(a) – the provision that punishes a sex offender who fails to "update a registration as required by [SORNA]" – when he moved to the Philippines without first appearing in person to update his registration in Kansas. J.A. 125. In particular, it held that Mr. Nichols had an obligation to report the change of residence to Kansas authorities under 42 U.S.C. § 16913(a) and (c). J.A. 121-125. The Tenth Circuit's decision solidified a conflict among the Circuits. That conflict is now before this Court for resolution.

A. Statutory Background

1. The first comprehensive sex offender registries originated in the state legislatures, not Congress. California established the first such registry in 1947. Wayne A. Logan, *Knowledge as Power: Criminal Registration and Community Notification Laws in America*, 31 (Stanford Univ. Press 2009). By 1989, only ten states had registry systems aimed exclusively at sex offenders. *Id.* This number increased dramatically in the early 1990s, when numerous

state legislatures enacted sex offender registry laws in response to a number of high-profile crimes against children. *Id.* at 49-55.

2. In 1994, Congress passed the first federal sex offender registration legislation, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act ("Wetterling Act"). Pub. L. No. 103-322, 108 Stat. 1796, 2038 (1994) (codified at 42 U.S.C. § 14071). The Wetterling Act did not create a federal crime for failure to register as a sex offender. Instead, it encouraged states, as a condition of receiving federal funds, to establish sex offender registry laws meeting certain minimum standards. 42 U.S.C. § 14071(a)(1), (b), (d) (1994); *Carr*, 560 U.S. at 452. In general, the Wetterling Act directed states to require initial registration of current addresses and registration of new addresses within ten days of establishing a new residence. 42 U.S.C. § 14071(a)(1), (b) (1994). If the new residence was in a different state, the states were directed to require sex offenders to register in the new state, not the old state (assuming the new state had a registry). *Id.* The Wetterling Act had no extra-territorial reach, nor did any of its provisions refer to foreign countries.

3. By 1996, every state had a sex offender registry. *Smith v. Doe*, 538 U.S. 84, 89-90 (2003). In that year, Congress amended the Wetterling Act when it enacted the Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, § 2, 110 Stat. 3093 (codified at 42 U.S.C. § 14072). The Lychner Act established a database

of registered sex offenders at the FBI. 42 U.S.C. § 14072(b). It also required sex offenders in states with non-compliant sex offender registries to register a current address with the FBI. *Id.* For these offenders, the Lychner Act mirrored the Wetterling Act's change-of-address registration requirements (registration in the new state within ten days of moving). 42 U.S.C. § 14072(g). It also directed any state agency notified by the sex offender of a change of residence to further notify law enforcement officials in the jurisdiction "to which, and the jurisdiction from which, the person has relocated." 42 U.S.C. § 14072(g)(4), (5). Like the Wetterling Act, the Lychner Act had no extra-territorial reach, nor did any of its provisions refer to foreign countries.

Unlike the Wetterling Act, the Lychner Act created a federal crime for failure to register in any state where the offender "resides, is employed, carries on a vocation, or is a student," but it limited the reach of federal criminal liability to offenders who lived in states that did not have federally compliant registries, federal offenders, persons sentenced by courts martial, and offenders crossing state borders. *Id.* (creating 42 U.S.C. § 14072(i) (1996)); *see also* Department of Justice Appropriations Act, 1999, Pub. L. No. 105-277, Div. A, § 101(b) [Tit. I, § 123(3)], 112 Stat. 2681-73 (amending subsection (i) but not expanding its reach to other offenders). Other offenders who failed to register in accordance with state registry laws were still subject to state prosecution. 42 U.S.C. § 14071(d).

4. Soon thereafter, Congress again amended the Wetterling Act to direct state registries to require a sex offender who moves to a different state to report the change of residence not only to the new state but also to the state "the person is leaving" (i.e., a "departure notification" requirement). Department of Justice Appropriations Act, 1997, Pub. L. No. 105-119, Tit. I, § 115(a)(1), 111 Stat. 2461 (42 U.S.C. § 14071(b)(5)) (1997). In states that codified this latter requirement, an offender's failure to abide by it could result in state prosecution, but not in federal prosecution. 42 U.S.C. § 14071(d); *see Carr*, 560 U.S. at 452-453.

5. By 2006, every state required offenders who moved to notify their former jurisdiction, to notify (and register with) their new jurisdiction, or, in many cases, both. Some states required offenders to give pre-departure notification,[1] while others required offenders to give post-departure notification.[2] Two

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[1] Ala. Code § 15-20-23(a) (2005); Ark. Code Ann. § 12-12-909(c) (2001); Fla. Stat. § 943.0435(7) (2005); 730 Ill. Comp. Stat. Ann. 150/3 (2006); Ky. Rev. Stat. Ann. § 17.510(10)(b)(1) (2000); Mass. Gen. Laws ch. 6, § 178E(i) (2003); Mich. Comp. Laws Ann. 28.725 Sec. 5(3) (2005); Minn. Stat. Ann. § 243.166 Subd. 3(b) (2005); N.J. Stat. Ann. § 2C:7-2(d) (2004); N.M. Stat. Ann. § 29-11A-4.1 (2005); N.D. Cent. Code § 12.1-32-15(7) (2005); Ohio Rev. Code Ann. § 2950.05(A) (2004); Okla. Stat. tit. 57, § 584(D) (2005); Tex. Code Crim. Proc. Ann. Art. 62.055(a) (2005); Va. Code Ann. § 9.1-903(D) (2005); Wis. Stat. Ann. § 301.45(4m) (2006). The specifics of the statutes differ in various respects.

[2] Alaska Stat. § 12.63.010(c) (1998); Ariz. Rev. Stat. § 13-3822(B) (2005); Cal. Penal Code § 290(f)(1)(a) (2005); Colo. Rev. Stat. § 16-22-108 (2004); Conn. Gen. Stat. §§ 54-252(b), 54-253(b),

(Continued on following page)

states also required sex offenders to give notification of moves to foreign countries. West Virginia required pre-departure notification of such a move. W. Va. Code § 15-12-7 (2004) (requiring a sex offender "who intends to move to another state or country" to "at least ten business days prior to such move notify the state police of his or her intent to move and of the location to which he or she intends to move."). The state of Washington required post-departure notification. Wash. Rev. Code § 9A.44.130(4)(a)(ix) (2003) (requiring an offender to "send written notice within ten days of moving to the new state or to a foreign country to the county sheriff with whom the person last registered in Washington state.").

6. a. In 2006, Congress repealed the Wetterling Act in favor of SORNA. Adam Walsh Child Protection and Safety Act ("the Adam Walsh Act"),

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54-254(b) (2002); Del. Code Ann. tit. 11, § 4120(f)(2) (2002); Ga. Code Ann. § 42-1-12(b)(4)(C) (2005); Haw. Rev. Stat. § 846E-6(a) (2005); Idaho Code Ann. § 18-8309(2) (2006); Ind. Code Ann. § 5-2-12-8(a) (2005); Iowa Code § 692A.3(4) (2000); Kan. Stat. Ann. § 22-4904(b) (2003); La. Rev. Stat. Ann. § 15:542.1(J)(1) (2006); Md. Code Ann., Crim. Proc. § 11-705(d) (2005); Mo. Rev. Stat. § 589.414(2) (2003); Mont. Code Ann. § 46-23-505 (2005); Nev. Rev. Stat. Ann. § 179D.250(1) (2001); N.H. Rev. Stat. Ann. § 651-B:5(I) (2002); N.Y. Correct. Law § 168-f(4) (2003); N.C. Stat. § 14-208.9(b) (2002); Or. Rev. Stat. Ann. § 181.595(3)(b) (2005); 42 Pa. Cons. Stat. Ann. § 9795.2(2)(i) (2004); R.I. Gen. Laws § 11-37.1-9(b) (2003); S.C. Code Ann. § 23-3-460 (2005); S.D. Codified Laws § 22-24B-12 (2006); Tenn. Code Ann. § 40-39-203(a)(2) (2006); Utah Code Ann. § 77-27-21.5(9)(a), (b) (2002); Vt. Stat. Ann. tit. 13, § 5407(a)(3) (2006); Wyo. Stat. Ann. § 7-19-302(e) (2005). These statutes also differ in various respects.

Pub. L. No. 109-248, Tit. 1, 120 Stat. 587 (2006); 42 U.S.C. § 16901 *et seq.*; *Reynolds v. United States*, 132 S.Ct. 975, 978 (2012). SORNA's stated purpose is to establish a "comprehensive national" sex offender registry. 42 U.S.C. § 16901. Like the Wetterling Act, SORNA attempts to achieve this purpose by setting minimum registration standards and withholding federal funds from states that do not "substantially implement" those standards. 42 U.S.C. § 16925; *Reynolds*, 132 S.Ct. at 978; *see also United States v. Kebodeaux*, 133 S.Ct. 2496, 2504-2505 (2013) (Congress "did not insist that the States" adopt SORNA's provisions.).

b. SORNA "somewhat modified" the Wetterling Act's minimum registration requirements. *Kebodeaux*, 133 S.Ct. at 2504. A sex offender must still register and keep his registration current in jurisdictions where "the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. § 16913(a). If an offender changes his residence, employment, or student status, he now has three business days (shortened from ten days) "after each change" to "appear in person in at least 1 jurisdiction involved" and to report changes in this information. *Compare* 42 U.S.C. § 14071(b)(5) (1994), 42 U.S.C. § 14072(g)(3) (2000), & 42 U.S.C. § 14072(i)(3), (i)(4) (2000), *with* 42 U.S.C. 16913(a), (c). A "jurisdiction involved" is one where the offender "resides," works, or attends school. 42 U.S.C. § 16913(c) (cross-referencing 42 U.S.C. § 16913(a)). "Resides" is now defined as "the location of the individual's home or

other place where the individual habitually lives." 42 U.S.C. § 16911(13).

c. Like the Wetterling Act, SORNA has no extra-territorial application. A "jurisdiction" covered by SORNA does not include a foreign country. 42 U.S.C. § 16911(10). Moreover, SORNA instructs the Attorney General and the Secretaries of State and Homeland Security to establish and maintain a notification system for offenders "entering the United States." 42 U.S.C. § 16928. There is no similar notification system for individuals "leaving the United States."

d. Unlike the Wetterling Act as amended, SORNA does not require a sex offender to report a change of residence to the jurisdiction "the person is leaving." *Compare* 42 U.S.C. § 16913, *with* 42 U.S.C. § 14071(b)(5) (1998 ed.). Instead, when an offender updates his registration in his new jurisdiction, it is that jurisdiction, and not the offender, that is required to provide the updated information to a number of entities, including all other jurisdictions in which the offender is required to register, 42 U.S.C. § 16913(c), and "each jurisdiction from or to which a change of residence, employment, or student status occurs," 42 U.S.C. § 16921(b)(1), (3).

Under SORNA, the states still play a critical role in tracking sex offenders. The FBI's national database is comprised of sex offenders required to register in state sex offender registries. 42 U.S.C. § 16919(a). The states and other covered jurisdictions are also

required to make available on the Internet detailed information about each sex offender in its registry. 42 U.S.C. § 16918(a).

e. The states retain a significant role in the enforcement of sex offender registry laws. Each state must provide a state criminal penalty for failure to comply with state sex offender registry obligations. 42 U.S.C. § 16913(e). The state penalty must carry a statutory maximum of at least one year in prison. *Id.* In SORNA, Congress actually returned more control to the states by eliminating the federal provisions and penalties for offenders who lived in states that did not have federally compliant registries. The perceived gap that those provisions and penalties were designed to fill was no longer present, "presumably because, by the time of [SORNA's] enactment, 'every State . . . had enacted some' type of registration system." *Carr*, 560 U.S. at 453 n.7. Leaving enforcement of state registries to the states, SORNA only "punishes violations of *its* requirements (instead of violations of state law)." *Kebodeaux*, 133 S.Ct. at 2505 (emphasis added).

Specifically, SORNA punishes any federal sex offender who is required to register under SORNA and who fails to register or update his registration "as required by [SORNA]." 18 U.S.C. § 2250(a)(2)(A). SORNA also punishes a sex offender who is required to register under SORNA, who "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country," and who thereafter fails to register or update a registration "as required by" SORNA.

18 U.S.C. § 2250(a)(2)(B); *Carr*, 560 U.S. at 446. The federal penalty carries a statutory maximum of ten years in prison, 18 U.S.C. § 2250(a), with increased penalties for offenders who commit crimes of violence, 18 U.S.C. § 2250(c).

7. a. In July 2008, the Justice Department issued guidelines to "provide guidance and assistance to the states and other jurisdictions in incorporating the SORNA requirements into their sex offender registration and notification programs." The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030-01 at 38030 (July 2, 2008) ("guidelines"), *implementing* 42 U.S.C. § 16912(b). The guidelines recognize that SORNA sets "minimum standards" for state registries and that states and other jurisdictions are free to exceed those minimum standards with requirements of their own. *Id.* at 38033, 38044, 38046.

For instance, the guidelines expressly acknowledge that a jurisdiction may require more stringent registration requirements, such as "requiring that changes of residence be reported before the sex offender moves, rather than within three business days following the move." *Id.* at 38046. The guidelines then instruct jurisdictions to require a sex offender "to inform the jurisdiction if the sex offender intends to commence residence, employment, or school attendance in another jurisdiction" or "outside of the United States." 73 Fed. Reg. 38030-01 at 38065, 38067. If so informed, the jurisdiction must inform all other jurisdictions in which the sex offender is

required to register, as well as the United States Marshals Service, so that the national databases can be updated. *Id.*

b. With respect to foreign changes in residence, the guidelines cite 42 U.S.C. § 16913(a), 42 U.S.C. § 16928, and 18 U.S.C. § 2250, and explain that the DOJ "needs to know" if sex offenders leave the country "since such offenders will be required to resume registration if they later return to the United States." 73 Fed. Reg. 38030-01 at 38067. Yet, the guidelines also explain that this departure notification requirement need not be done "in person" under § 16913(c) because that provision involves only changes of residence "between jurisdictions or within jurisdictions." *Id.* "The means by which sex offenders are required to report other changes in registration information discussed in this Part are matters that jurisdictions may determine in their discretion." *Id.*

The guidelines further recognize that "a sex offender who moves to a foreign country may pass beyond the reach of U.S. jurisdictions and hence may not be subject to any enforceable registration requirement under U.S. law unless and until he or she returns to the United States." 73 Fed. Reg. 38030-01 at 38066. Finally, the guidelines make clear that SORNA never requires continued registration in a jurisdiction if the sex offender does not reside, work,

or attend school in that jurisdiction. *Id.* at 38061, 38065.[3]

8. Kansas is one of seventeen states that the Justice Department presently identifies as SORNA compliant.[4] It requires sex offenders to notify state officials within three business days of any "change or termination of residence location." Kan. Stat. Ann. § 22-4905(g). Kansas also requires sex offenders to provide departure notification of international travel (but not international changes in residence), consistent with the Justice Department's supplemental guidelines. Kan. Stat. Ann. § 22-4905(o); note 3, *supra*. Kansas prosecutes all but mere fee-payment violations of the Kansas registration laws as felonies. Kan. Stat. Ann. § 22-4903.

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[3] In 2011, the Justice Department issued supplemental guidelines concerning international travel for registered sex offenders living in the United States. Supplemental Guidelines for Sex Offender Registration and Notification ("supplemental guidelines"), 76 Fed. Reg. 1630-01 (Jan. 11, 2011). The supplemental guidelines direct jurisdictions to require sex offenders to give notice of any intended international travel 21 days in advance, although this rule is flexible. *Id.* at 1633. The stated authority for this directive is 42 U.S.C. § 16914 ("Information required in registration"), not § 16913 or § 16928. *Id.* In doing so, the supplemental guidelines readily acknowledge that "[t]he Attorney General has no authority to repeal or amend Federal or States laws by issuing guidelines." *Id.* at 1631-1632.

[4] http://www.smart.gov/newsroom_jurisdictions_sorna.htm (last accessed December 15, 2015).

B. Factual Background

In 2003, Lester Nichols was convicted of a sex offense under 18 U.S.C. § 2423. J.A. 118. He served a term of imprisonment and was released from prison in March 2012. While on supervised release, Mr. Nichols registered as a sex offender in Kansas and updated that registration every three months, including in October 2012. J.A. 54-55, 119. In November 2012, Mr. Nichols moved from Kansas to the Philippines. *Id.* He did not notify the Kansas authorities before or after this change of residence. In December 2012, Mr. Nichols was arrested in the Philippines, deported to California, and transported to Kansas to face the charge in this case. *Id.*

C. Proceedings in the District Court

In June 2013, a federal grand jury in Kansas returned a one-count indictment against Mr. Nichols, charging him with failure to update his sex offender registration in November 2012, in violation of 18 U.S.C. § 2250(a). J.A. 11. In October 2013, Mr. Nichols moved to dismiss the indictment. He asserted, *inter alia*, that SORNA did not require him to register as a sex offender in the Philippines or to update his Kansas registration to reflect his move to the Philippines. J.A. 13.

The district court denied Mr. Nichols's motion, finding itself bound by the Tenth Circuit's decision in *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011). J.A. 58. Relying on *Murphy*, the district court

determined that Mr. Nichols violated SORNA when he did not update his registration in Kansas after he "abandoned" his Kansas residence but before he departed the country for the Philippines. *Id.*

Thereafter, Mr. Nichols entered into a conditional guilty plea, preserving the right to appeal the denial of his motion to dismiss. J.A. 84. Ultimately, the district court sentenced Mr. Nichols to a ten-month term of imprisonment, to be followed by a five-year term of supervised release. J.A. 105-106. Mr. Nichols currently resides in Wichita, Kansas, where he is serving the last few years of his term of supervised release.

D. Proceedings in the Court of Appeals

The Tenth Circuit affirmed Mr. Nichols's conviction in a published decision. J.A. 117. Like the district court, the panel found itself bound by *Murphy*. J.A. 125. It concluded: "[b]y boarding a plane to the Philippines, Mr. Nichols abandoned his residence in Kansas – a 'jurisdiction involved.' This change in residence triggered a registry obligation in Kansas, which Mr. Nichols did not fulfill." J.A. 125.

Murphy involved an analogous situation: a sex offender failed to update his registration in Utah when he moved to Belize. 664 F.3d at 799-800. The Tenth Circuit, over a dissent by Judge Lucero, held that the defendant was required to update his Utah registration when he "abandoned" his Utah residence,

even though he did not relocate within Utah. *Id.* at 800.

In *Murphy*, the Tenth Circuit determined that the appeal turned on the phrase "jurisdiction where the offender resides" in § 16913(a), and "residence" in § 16913(c). 664 F.3d at 800. It held that the two concepts are different, although in a footnote it concluded that the "two separate concepts [] are defined in the same way by the same term." *Id.* at 801 n.1. Citing "the logic of the statute," the Tenth Circuit held that a change of "residence" triggers a reporting obligation to the jurisdiction where the defendant "resides," and that this reporting obligation does not depend on whether the defendant "remains unemployed, out of school, or leaves the country." *Id.* at 801.

The Tenth Circuit gave three reasons for its "logic of the statute" determination: (1) "abandoning one's living place constitutes a change in residence under SORNA"; (2) when an offender leaves a residence in a state and then leaves the state entirely, the state remains a "jurisdiction involved" "so long as the offender was still a resident of the state when the abandonment occurred"; and (3) a reporting obligation does not disappear because an offender relocates to a non-SORNA jurisdiction before the three-business-day deadline elapses, as "the obligation to update a registration attaches to the sex offender as soon as a change in status occurs." *Id.* at 801-803.

Judge Lucero's dissent in *Murphy* found the majority's holding "indefensible" as a matter of statutory

interpretation and of common sense. *Id.* at 805. Judge Lucero disagreed that the defendant had an obligation to report his change of residence to Utah because at no point in time did the defendant change his residence within Utah, nor was Utah a "jurisdiction involved" once the defendant "abandoned" his residence. *Id.* Judge Lucero asked how the defendant could reside in Utah if he no longer had a residence in Utah. *Id.* at 806. Judge Lucero rejected the majority's conclusion that an individual could reside in a state merely because he was present in the state, where he no longer had a habitual residence within the state. *Id.* He found unwarranted the majority's decision to give inconsistent definitions to the terms "resides" and "residence." *Id.*

In a short concurrence in Mr. Nichols's case, Judge McKay disagreed with *Murphy*, agreed with Judge Lucero's dissent in *Murphy* and the Eighth Circuit's decision in *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013), and urged the Tenth Circuit to rehear the case en banc. J.A. 132.

In *Lunsford*, the Eighth Circuit expressly disagreed with the Tenth Circuit's decision in *Murphy* and held that a sex offender who moves to a foreign country need not update his sex offender registration in his former jurisdiction.[5] 725 F.3d at 861-862. The

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[5] If not otherwise clear, we use the phrase "former jurisdiction" in this brief to refer to the jurisdiction where an offender last registered as a sex offender.

Eighth Circuit held that the defendant in *Lunsford* had no obligation to update his Missouri registration after his move to the Philippines because he no longer resided in Missouri and, thus, Missouri was no longer a "jurisdiction involved" for purposes of § 16913(a). 725 F.3d at 861. Because an offender need only update a registration in a jurisdiction in which he "resides," not a jurisdiction in which he "resided," the defendant in *Lunsford* had no obligation to update his Missouri registration when he moved to the Philippines. *Id.* at 861-862.

By a vote of 8 to 4,[6] the Tenth Circuit, in a published order, declined to rehear Mr. Nichols's case en banc. J.A. 134. In dissent, Judge Lucero noted his continued belief that *Murphy* was wrongly decided and that the Eighth Circuit correctly decided *Lunsford*. J.A. 135.

SUMMARY OF THE ARGUMENT

I. Whether Lester Nichols can be prosecuted under 18 U.S.C. § 2250 for a failure to register or update his sex offender registration turns on this Court's interpretation of 42 U.S.C. § 16913. Section 16913 does not require a sex offender who moves to a foreign country to keep his registration current in his former jurisdiction. The provision's text plainly

[6] Judge McKay, who is on senior status, elected not to participate in the en banc proceedings. J.A. 25.

requires the sex offender to register and to keep the registration current only in "each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. § 16913(a). Congress used present-tense verbs, thus signifying a requirement to register where the offender presently resides, works, or attends school, not where the offender formerly resided, worked, or attended school. Congress further defined the term "resides" in the present tense, and with reference to the offender's home or similar place, 42 U.S.C. § 16911(13), which confirms that an offender is not required to register in a jurisdiction where he formerly resided, worked, or attended school.

Congress's requirement that an offender register or keep his registration current "in person" supports this plain text reading of § 16913. In order to register or keep a registration current "in person," the offender must be present within the jurisdiction, and an offender is present in the jurisdiction where he "resides," works, or attends school, not in a jurisdiction in which he formerly resided, worked, or attended school.

Moreover, Congress gave an offender three business days "after each change of name, residence, employment, or student status" to register or keep a registration current. 42 U.S.C. § 16913(c). The clear import of this three-business-day deadline, triggered by the change of residence, employment, or student status, is to allow an offender sufficient time to report the changes. As applied to a change of residence, for

instance, Congress gives the offender three business days to move to the new residence and then to register or update the registration in the new jurisdiction.

Congress also requires an offender to keep registrations "current," 42 U.S.C. § 16913(c), and a "current" registration would include "current" information, not past or future information. If a sex offender must update a registration in person within the former jurisdiction, in cases involving changes of residence to foreign countries, the sex offender would necessarily update the registration prior to the actual change of residence. In doing so, any "current" information would not be useful. And finally, SORNA does not apply to foreign countries like the Philippines. 42 U.S.C. § 16911(10). Thus, an offender who moves to a foreign country, and who does not work or attend school in a covered SORNA jurisdiction, no longer has an obligation to register or keep his registration current under SORNA. For these reasons, § 16913 does not require a sex offender who moves to a foreign country to register or keep his registration current in a former jurisdiction within the United States.

II. In three respects, SORNA's statutory context, purpose, and history confirm this plain text reading of § 16913. First, in § 16928, Congress instructed the Attorney General and the Secretaries of State and Homeland Security to establish a notification system for offenders "entering the United States," but not "leaving" the United States. Second, SORNA's purpose was to create a "national" sex offender registration system, 42 U.S.C. § 16901, not an

"international" sex offender registration system. Finally, the statutory history confirms that if Congress meant to require a sex offender to inform a former jurisdiction of a change of residence, it would have done so expressly, as it did in the Wetterling Act as amended. This statutory history also confirms that departure-notification provisions go beyond the "minimum standards" found in SORNA and are thus more appropriately considered to be state-law requirements enforced by the states.

III. Section 16913's plain language, when considered in context and with a view to its purpose and history, does not require an offender who moves to a foreign country to register or keep his registration current in his former jurisdiction within the United States. To the extent that § 16913's language is considered ambiguous, any ambiguity should be resolved in Mr. Nichols's favor. In the end, the Tenth Circuit erred when it held that Mr. Nichols committed a federal crime when he failed to update his Kansas registration *after* he moved from Kansas to the Philippines.

ARGUMENT

I. The plain meaning of § 16913 does not require a sex offender who moves to a foreign country to keep his registration current in his former jurisdiction.

Because the question presented is one of statutory interpretation, the analysis begins with the language of the statute. *Dean v. United States*, 556 U.S. 568, 572 (2009). The statute of conviction, 18 U.S.C. § 2250(a), punishes a federal sex offender who "knowingly fails to register or update a registration as required by [SORNA]." Thus, whether Mr. Nichols violated § 2250 turns on the meaning of SORNA's registration requirements in 42 U.S.C. § 16913. *See Lunsford*, 725 F.3d at 860-861; *Murphy*, 664 F.3d at 800.

Section 16913(a) requires a sex offender to register, "and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." Section 16913(c) further defines what it means to keep a registration current:

> [a] sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry.

For six interrelated reasons, these provisions do not require a sex offender who moves to a foreign country to register or keep a registration current in a former jurisdiction within the United States.

A. Congress used present tense verbs to define the jurisdictions where an offender must register and keep the registration current.

"Congress's use of verb tense is significant in construing statutes." *United States v. Wilson*, 503 U.S. 329, 333 (1992). When interpreting SORNA in *Carr v. United States*, this Court found Congress's use of the present tense in § 2250's travel requirement dispositive. 560 U.S. at 447-448. *Carr* held that the requirement that an offender "travels," rather than "traveled" or "has traveled," "reinforces the conclusion that preenactment travel falls outside the statute's compass." *Id.* Because "the present tense generally does not include the past," "a statute that regulates a person who 'travels' is not readily understood to encompass a person whose only travel occurred before the statute took effect." *Id.* at 448.

Similarly, it is significant that Congress used the present tense in § 16913(a)'s registration requirement to define the jurisdictions in which an offender must register and keep the registration current. An offender must register in the jurisdiction where he "resides," "is an employee," and "is a student." 42 U.S.C. § 16913(a). An offender who changes his residence, employment, or student status must also report

such changes to at least one "involved" jurisdiction. 42 U.S.C. § 16913(c). An "involved" jurisdiction, in turn, is one where the offender "resides," "is an employee," and "is a student." *Id.* (cross-referencing § 16913(a)). This consistent present-tense construction reinforces the conclusion that sex offenders need not register or keep registrations current in jurisdictions in which they formerly resided, worked, or attended school. *Carr*, 560 U.S. at 449 ("[A] statute's undeviating use of the present tense" is "a striking indicator of its prospective orientation.") (quotations omitted). Because § 16913(a) consistently speaks in the present tense, it plainly states that a continuing presence in the jurisdiction is a prerequisite to a duty to keep current a registration within that jurisdiction. *Cf. Otte v. United States*, 419 U.S. 43, 49-50 (1974) (holding that payment of wage provision written in both the past and present tense did not reveal the necessity of a continuing employment relationship).

In *Carr*, this Court noted that § 2250(a)(2)(B) uses the present-tense phrase "resides in Indian country" and found "implausible" a reading of this text that would "encompass persons who once resided in Indian country." 560 U.S. at 449. It is similarly implausible to read § 16913(a) to define the relevant jurisdictions to include those jurisdictions where the sex offender once resided. Instead, § 16913(a) plainly requires a sex offender to register and keep the registration current in the jurisdiction where he "resides," not a jurisdiction where he "resided." *Lunsford*, 725 F.3d at 861. When an offender moves to a

foreign country, he no longer "resides" within the United States. The former jurisdiction is thus no longer a "jurisdiction involved" under § 16913(c), and the offender no longer has an obligation to keep his registration current there. *Lunsford*, 725 F.3d at 861; 73 Fed. Reg. 38030-01 at 38065 (acknowledging that an offender who moves to a foreign country "may no longer be required to register" in his former jurisdiction).

The Tenth Circuit avoided this plain reading of the statute by ignoring *Carr*. Even though this Court decided *Carr* more than a year before the Tenth Circuit's decision in *Murphy*, and even though *Carr* involved the interpretation of present-tense verbs within SORNA, the decision in *Murphy* did not once mention or cite to *Carr*.[7] This critical omission allowed the Tenth Circuit to reach an implausible interpretation of § 16913.

B. Congress also defined "resides" in the present tense and with reference to the location of an individual's home or similar place.

SORNA defines "resides" as "the location of the individual's home or other place where the individual habitually lives." 42 U.S.C. § 16911(13). This present-tense definition confirms that an offender

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[7] Because the panel decision below found itself bound by the decision in *Murphy*, J.A. 125, we focus on *Murphy*, and not the underlying decision, throughout the brief.

must register and keep the registration current only in those jurisdictions in which he presently resides, works, or attends school. *Carr*, 560 U.S. at 447-449; *Lunsford*, 725 F.3d at 861. Had Congress meant to reach beyond jurisdictions where an offender presently "resides," it could have done so by defining "resides" in relation to a past location. But it did not. And because it did not, it is improper to interpret SORNA to require a sex offender who moves to a foreign country to register or update a registration in the jurisdiction where he resided. *Dean*, 556 U.S. at 572 (courts do not read "words or elements into a statute that do not appear on its face").

Moreover, Congress defined "resides" primarily as "the location of one's home." 42 U.S.C. § 16911(13). In common usage, one's home is one's residence. Webster's Encyclopedic Unabridged Dictionary of the English Language 1638 (1996) (defining "residence" as "the place, esp. the house, in which a person lives or resides"); Black's Law Dictionary 1308 ("Place where one actually lives or has his home; a person's dwelling place or place of habitation; an abode; house where one's home is; a dwelling house.") (6th ed. 1990). Thus, when one moves from one home to another home located in a different jurisdiction, by definition, the individual no longer "resides" in the former jurisdiction. 42 U.S.C. § 16911(13). Because the individual now "resides" within a different jurisdiction, SORNA requires the individual to register in that jurisdiction, and not the former jurisdiction. 42 U.S.C. § 16913(a); *Lunsford*, 725 F.3d at 861.

Congress's inclusion of the phrase "or other place where the individual habitually lives" confirms that the offender must register and update his registration in the jurisdiction where the offender's present dwelling place is located. 42 U.S.C. § 16911(13).

The Tenth Circuit made three critical mistakes in its interpretation of the term "resides." First, it all but ignored the statutory definition of "resides'" in § 16911(13). *Murphy*, 664 F.3d at 806 (Lucero, J., dissenting). At no point in its decision in *Murphy* did the Tenth Circuit acknowledge that Congress actually defined "resides" in § 16911(13).[8] Only by sidestepping this definition could the Tenth Circuit conclude, "[w]hen an offender leaves a residence in a state, and then leaves the state entirely, that state remains a jurisdiction involved." 664 F.3d at 803. But, under § 16911(13)'s definition of "resides," this would be true only if the offender still has a home or habitually lives within the state (for instance, if the offender goes on vacation). If the offender moves from the state, it is not true under § 16911(13) that the offender still "resides" in that state. *Murphy*, 664 F.3d at 806 (Lucero, J., dissenting).

Second, the Tenth Circuit also defined "the jurisdiction where the offender resides" in relation to the state where the offender "was still a *resident*" at the time he "abandoned" his home. *Murphy*, 664 F.3d

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[8] The Tenth Circuit cited § 16911(13) once in a footnote, but did so to define "residence," not "resides." 664 F.3d at 800 n.1.

at 803 (emphasis added). But SORNA has nothing to do with an offender's status as a "resident" in a particular state. The word "resident" is nowhere to be found within SORNA. As Judge Lucero aptly explained in his dissent in *Murphy*, the Tenth Circuit's discussion on this point "merely begs the question." *Murphy*, 664 F.3d at 806. If an offender does not have a home or otherwise habitually live in a state, he does not "reside" in that state for purposes of SORNA. *Id.* Even if the offender "might qualify as a resident of the state as the word 'resident' is normally used, [] we must adhere to the definition provided by Congress." *Id.*

Finally, the Tenth Circuit also parsed an odd distinction between the terms "resides" and "residence," referring to the terms as "*two different concepts*." *Murphy*, 664 F.3d at 800. In the Tenth Circuit's view, a person's "residence" is merely the house in which the person lives, while a person "resides" in a broader sense within the jurisdiction where his house is located. *See id.* at n.1. Thus, according to the Tenth Circuit, a person who "abandons" his residence in Kansas nonetheless continues to reside in Kansas, at least, apparently, until he sets foot in a new residence elsewhere.

As a matter of common usage, however, one "resides" *in one's* "residence." Webster's Encyclopedic Unabridged Dictionary of the English Language 1638 (1996) (defining "residence" as "the place, esp. the house, in which a person lives or resides"); Oxford

English Dictionary, Vol. II 517 (1987) (defining "residence" as "to have one's usual dwelling-place or abode; to reside"); Oxford American Dictionary 771 (1980) (defining "residence" as "a place where one resides"). It may well be that the Tenth Circuit was uncomfortable with the idea that a person might not reside anywhere between the time that he closes the door at his old residence and opens the door at his new one. But this residency limbo is exactly what Congress created with § 16913(c)'s three-business-day grace period. *See* Section I(D), *infra*.

Moreover, this common-usage interpretation is borne out in § 16913(a) itself. There, Congress provided that, for initial registration purposes only, a sex offender must also register "in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence." 42 U.S.C. § 16913(a). It is implausible to suggest that the "jurisdiction of residence" referred to in this provision is meant to refer to some jurisdiction different than the jurisdiction where the offender "resides." If that were the case, then the provision would actually provide for registration in the jurisdiction where the offender "resides," the "jurisdiction of residence," and the "jurisdiction in which convicted." But SORNA makes no effort to define "jurisdiction of residence," although it defines "resides." *See* 42 U.S.C. § 16911(13). There is nothing in the statutory text to support the unnatural conclusion that one "resides" somewhere other than

his "residence."[9] Nor is it sensible to conclude that one "resides" where he used to live.

Section 16911(13) is clear: an offender "resides" only in the jurisdiction where his home is located or where he habitually "lives." That definition cannot plausibly extend to an individual who no longer has a home or "lives" within a jurisdiction, even during the time it takes for the person to get from the front door of his former residence across the jurisdiction's state line.

Finally, the Tenth Circuit's definition of "resides" is also inconsistent with the plain meaning of that term. To reside is typically understood as "to dwell permanently or for a considerable time," Webster's Encyclopedic Unabridged Dictionary of the English Language 1638 (1996), or "to settle; to take up one's abode or station," Oxford English Dictionary, Vol. II 517 (1987). An individual who "abandons" a residence in one jurisdiction and moves to another jurisdiction

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[9] The guidelines provide a definition of "residence," but that definition is simply a reiteration of the definition of "resides" in § 16911(13). 73 Fed. Reg. 38030-01 at 38061. To the extent that the guidelines attempt to add meaning to the definition of "resides," they do so only in the context of a sex offender with no fixed abode. *Id.* at 38061-38062. But this case does not involve a homeless or otherwise itinerant offender. Moreover, there is nothing within the guidelines to suggest that this definition has anything to do with an offender who is in the process of moving. Rather, the guidelines make clear that § 16913(c)'s three-business-day grace period covers this latter situation, without any need to augment or modify the statutory requirements. *Id.*

or a foreign country has not "settled" in the former jurisdiction. He has done the opposite. His continued existence within that jurisdiction immediately upon his "abandonment" of his residence does not mean that he still "resides" within that jurisdiction. For SORNA's purposes, one does not "reside" wherever he happens to be. One "resides" in the jurisdiction where his home or similar place is located, and an individual who moves to a home in a different jurisdiction no longer resides within the former jurisdiction. 42 U.S.C. § 16913(a).

C. A sex offender must update changes of residence, employment, and student status "in person" in at least one jurisdiction where the offender resides, works, or attends school.

SORNA not only requires in-person periodic verifications, 42 U.S.C. § 16916, but it also expressly provides that sex offenders who report changes in residence, employment, or student status must do so "in person" in at least one jurisdiction where the offender resides, works, or attends school, 42 U.S.C. § 16913(c). This in-person requirement is statutorily linked to the present-tense language found in § 16913(a). 42 U.S.C. § 16913(c) ("in at least one jurisdiction involved pursuant to subsection (a)").

This "in-person" requirement thus confirms that Congress expects a sex offender to update a registration where the offender "resides," works, or attends

school, not where he resided, worked, or attended school. *See* 73 Fed. Reg. 38030-01 at 38065 (in-person requirement involves a direct meeting "between the sex offenders and the personnel or agencies who will be responsible for their registration."). As a practical matter, an individual has to be "present" in a jurisdiction in order to register or update a registration "in person." It would make little sense for Congress to require a sex offender to update a registration "in person" in a jurisdiction in which the offender no longer resides, works, or attends school. The sex offender would have no reason to be physically present within that jurisdiction.

In a case like this one involving a move to a foreign country, asking the offender to update his registration in Kansas "after [his] change of residence" to the Philippines borders on the impossible. *See* 42 U.S.C. § 16913(c). This Court should not adopt the registration system envisioned by the Tenth Circuit, in which an offender is required to report "in person" to the registration office in Kansas to update the registration after he "abandons" his residence but prior to boarding the plane for his international flight (or bus for his international ride). *See Murphy*, 664 F.3d at 801-802. While the offender is undoubtedly present within Kansas for some period of time, his presence remains only as long as it takes him to depart the jurisdiction. During this brief period, he no longer "resides" in Kansas. Thus, Congress does not require him to update his Kansas registration. *See* Sections I(A) & (B), *supra*.

D. A sex offender has three business days after a change of residence to keep his registration current in the jurisdiction where he presently resides.

SORNA does not generally require a sex offender to update a registration immediately. *See Reynolds*, 132 S.Ct. at 983 (noting that the government's argument "overstates the need for instantaneous registration"). Nor does the plain language of § 16913(c) require sex offenders to report changes in residence, employment, or student status prior to the actual change. Instead, SORNA requires a sex offender to, "not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in information." 42 U.S.C. § 16913(c). This three-business-day deadline allows a sex offender some leeway in keeping his registration current.

When combined with the present-tense verbs used by Congress in § 16913, and Congress's requirement that an offender update a change of residence "in person," the three-business-day deadline in § 16913(c) confirms that an offender need not update a registration in his former jurisdiction. The deadline provides for registration "after" a "change of residence," and a change of residence from one jurisdiction to another eliminates any requirement that the offender update the registration in the jurisdiction

where he used to reside. 42 U.S.C. § 16913(a), (c); *Lunsford*, 725 F.3d at 861-862.

The Tenth Circuit appears to hold that, when a sex offender moves to a different jurisdiction, he must update his registration in the former jurisdiction after he changes his residence but *before* his departure to the new jurisdiction. *Murphy*, 664 F.3d at 800. Yet, this interpretation of § 16913(c) is inconsistent with Congress's inclusion of a grace period in § 16913(c). The obvious purpose of the grace period is to allow the offender an opportunity to move from one residence to another residence and then register or update a sex offender registration. By giving sex offenders this three-business-day grace period, Congress clearly envisions a sex offender registry system in which an offender *first* moves, and *then* registers in the new jurisdiction of residence. 42 U.S.C. § 16913(a), (c); *see* Sections I(A) & (B), *supra*.

It is not uncommon for Congress to use the phrase "not later than . . . after a [specified event]" in setting forth time limitations. *See, e.g.*, 15 U.S.C. § 4305 ("such venture shall, not later than 90 days after a change in its membership, file simultaneously with the Attorney General and the Commission a written notification disclosing such change."); 49 U.S.C. § 31134(d) ("The Secretary may require an employer to update a registration under this section not later than 30 days after a change in the employer's address, other contact information, officers, process agent, or other essential information"). In doing so, it is clear that the specified event (a change

in membership or a change in officers, for example) triggers the applicable time period in which to act.

This Court need look no further than § 16913 itself to confirm this proposition. In § 16913(b)(2), Congress provided for initial registration of a sex offender "not later than 3 business days after being sentenced for the offense, if the sex offender is not sentenced to a term of imprisonment." Because a sex offender either is or is not sentenced to a term of imprisonment at sentencing, the applicable three-business-day deadline is necessarily triggered when the defendant is "sentenced for the offense." Similarly, the specified act at issue here – keeping a registration current – cannot be done until the condition precedent happens – "change of residence, employment, or student status." 42 U.S.C. § 16913(c).

Because the offender is allowed to update the registration up to three business days after the change of residence, it would be inconsistent to require the offender to update the registration in the former jurisdiction. Again, if the offender moves from that jurisdiction, he no longer "resides" there. The Justice Department's guidelines echo this reading of § 16913(c). Specifically, the guidelines expressly acknowledge that "requiring that changes of residence be reported before the sex offender moves, rather than within three business days following the move," would be a "more stringent registration requirement" than SORNA imposes. 73 Fed. Reg. 38030-01 at 38046. Thus, even while encouraging states to impose more stringent requirements, the guidelines

recognize that such requirements neither appear in SORNA nor are enforceable by way of SORNA.

The Tenth Circuit's decision also effectively writes the three-business-day deadline out of the statute when an offender moves to a foreign country. *See Barber v. Thomas*, 560 U.S. 474, 489-490 (2010) ("Because the dissent's approach would require us to read words out of the statute . . . its definition cannot be used here."). The Tenth Circuit's premise is that the former jurisdiction is still a "jurisdiction where the offender resides," but if this is true, there would appear to be no set time in which the former jurisdiction ceases to be a "jurisdiction where the offender resides."

For instance, consider a situation in which an offender, like Mr. Nichols, not only changes his residence in one day, but physically leaves the jurisdiction on that first day. The offender could not plausibly be considered to reside in the former jurisdiction on the second or third days. Yet, the Tenth Circuit insists on this fallacy. *Murphy*, 664 F.3d at 803. In effect, then, under the Tenth Circuit's interpretation, the grace period is not three business days, but rather the amount of time it takes the defendant to depart the jurisdiction. This atextual argument should be rejected. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992) ("We have stated time and again that courts must presume that a legislature says in a

statute what it means and means in a statute what it says there.").[10]

E. A sex offender who changes his residence must update a registration with "current" information, not past or future information.

Section 16913(c) expressly requires a sex offender to keep his registration "current." "Current" is defined as "belonging to the present time, happening now," Oxford American Dictionary 210 (1980), or "belonging in time; belonging to the time actually passing," Webster's Encyclopedic Unabridged Dictionary of the English Language 491 (1996). *See also* Black's Law Dictionary 382 (6th ed. 1990) (*inter alia*, "present existence; now in progress; whatever is at present in course of passage"). When an offender reports

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[10] To the extent that the Tenth Circuit was concerned that registration is necessary in Kansas because the offender temporarily resides there pending his out-of-jurisdiction change of residence, its decision is inconsistent with the guidelines, which require registration of temporary lodging only when the sex offender is away from his residence "for seven or more days." 73 Fed. Reg. 38030-01 at 38056. There is nothing in this case to indicate that Mr. Nichols failed to establish a residence in the Philippines within seven days of his arrival there. And even if there were, Mr. Nichols admitted below that he moved from Kansas to the Philippines. J.A. 17 ("Mr. Nichols flew to the Philippines without any intent to return."). He was not in the Philippines as a vacationing Kansas resident. Once in the Philippines, his registration requirements came to an end. *See* 42 U.S.C. § 16911(10); Section I(F), *infra*.

a change of residence, employment, or student status, he must provide "current" information, not past or future information. For instance, a sex offender who resides in Kansas would report his current Kansas address, whether he intends to move from Kansas or whether he just moved to Kansas from another jurisdiction. At no point would an offender report "past" or "future" information when "[k]eeping the registration current" for purposes of § 16913(c).

The only time in which § 16913 expressly requires a sex offender to provide future information is during initial registration prior to release from imprisonment, when the offender "is not yet residing in the place or location to which he or she expects to go following release." 73 Fed. Reg. 38030-01 at 38055 (explaining § 16914(a)(3)'s requirement to report the address where the offender "resides or will reside"); 42 U.S.C. § 16913(a).[11] In contrast, § 16913(c) opts for "current" information, with an instruction to the jurisdiction to "immediately provide" this current information to other jurisdictions. *See also* 42 U.S.C. §§ 16919, 16921 (providing additional requirements for jurisdictions to update information amongst

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[11] Section 16914 also sets forth additional information a sex offender must provide in his registration, but this information is a separate requirement than the change-of-residence information required by § 16913. *See* 73 Fed. Reg. 38030-01 at 38067. The government's theory below was that Mr. Nichols violated SORNA when he failed to update his sex offender registration *after* he moved from Kansas, not *before* he moved from Kansas, thus implicating § 16913, not § 16914.

themselves). Because the Tenth Circuit's decision effectively requires a sex offender to report a future residence, not a current residence, it is inconsistent with § 16913(c)'s text.

Moreover, if the Tenth Circuit is correct, and a sex offender who moves from Kansas to a different jurisdiction or a foreign country must still update his registration in person in Kansas with "current" information, it is unclear what information the sex offender would be required to provide. The offender could not report his *past* Kansas residence because he no longer "resides" there (nor would it be a "change of residence"). Nor could the offender sensibly report his *future* residence as his "current" residence. 42 U.S.C. § 16911(13). He arguably would not have a "current" residence while traveling from one residence to the other.

Congress could not have intended such a confused system. A "change of residence" is not so broad as to include every step a sex offender takes while in the process of changing residences. Congress took a more common sense approach than that: a sex offender who changes his residence has three business days to report that change to the jurisdiction where he resides, not to his former jurisdiction.[12]

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[12] Again, this case has nothing to do with the problem of homeless or itinerant offenders. Mr. Nichols was neither homeless nor itinerant. No doubt, homeless or itinerant offenders pose problems for any registration system. But those problems

(Continued on following page)

F. A foreign country is not a SORNA jurisdiction.

Again, SORNA requires a sex offender who changes his residence to update his registration in person "in at least 1 jurisdiction involved" "not later than 3 business days after each change of name, residence, employment, or student status." 42 U.S.C. § 16913(c). "Involved" jurisdictions are jurisdictions in which an offender presently "resides," "is an employee," or "is a student." 42 U.S.C. § 16913(a). But a "jurisdiction" under SORNA does not include a foreign country like the Philippines. 42 U.S.C. § 16911(10) (defining "jurisdiction" as a state, the District of Columbia, a United States territory, or a federally recognized Indian tribe).

Consequently, once an offender no longer "resides," "is an employee," or "is a student" in the United States, there are no longer any jurisdictions "involved" in which to keep the registration current. In other words, when a sex offender, like Mr. Nichols, moves to a foreign country, he is no longer subject to SORNA's registration requirements. 42 U.S.C. § 16911(10); *Lunsford*, 725 F.3d at 861; *see also EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent

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are not raised in this case. *Cf.*, *Murphy*, 664 F.3d at 801 n.2 (discussing registration requirements of "itinerant[s]" or "peripatetic[s]").

appears, is meant to apply only within the territorial jurisdiction of the United States.'").

As a practical matter, then, a sex offender is no longer required by SORNA to register or keep a registration current after a change of residence to a foreign country. Without this continued registration requirement, sex offender registries cannot possibly include "current" information for offenders who reside in foreign countries. If the offender, *inter alia*, changes his residence within the foreign country, moves to a different foreign country, obtains a new job overseas, or enrolls at a foreign school, this information will not be reflected on any sex offender registry. *See Murphy*, 664 F.3d at 804. Considering this, it becomes even more implausible to interpret § 16913(c) to require a sex offender to update a registration "after" a change of residence to a foreign country.

In the end, the Tenth Circuit's decision – requiring a sex offender to report a change of residence to a former jurisdiction – is an atextual gloss on § 16913. In plain terms, that provision requires an offender to register or keep a registration current in each jurisdiction where the offender presently resides, works, or attends school. If an offender changes his residence, work, or school, he has three business days to report that change to at least one jurisdiction where he resides, works, or attends school. But if the change of residence is to a foreign country (and the offender does not work or attend school within the United States), the sex offender moves beyond SORNA's

reach. Section 16913 is clear on this. The Tenth Circuit's contortions aside, Mr. Nichols had no federal obligation to register under SORNA's plain language when he moved from Kansas to the Philippines. And because he had no federal obligation to register under SORNA, he did not violate § 2250(a).

II. SORNA's statutory context, purpose, and history confirm that a sex offender who moves to a foreign country need not register or keep his registration current in a former jurisdiction within the United States.

"[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). The statute's history and purpose are also relevant to its meaning. *United States v. Quality Stores, Inc.*, 134 S.Ct. 1395, 1401 (2014); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7 (2011).

A. SORNA does not expressly regulate offenders who leave the United States.

Unlike its predecessors, SORNA is not entirely silent on sex offenders and foreign countries. In 42 U.S.C. § 16928 – "Registration of sex offenders entering the United States" – Congress directed the Attorney General, in consultation with the Secretaries of State and Homeland Security, "to establish and

maintain a system for informing the relevant jurisdictions about persons entering the United States who are required to register under [SORNA]." In contrast, no provision similar to § 16928 exists with respect to persons *leaving* the United States.

Congress's omission of "leaving" in § 16928 is significant because it demonstrates that Congress could have provided for a system to inform the relevant jurisdictions about persons "entering or leaving" the United States, but did not. "The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Texts* 93 (2012). An "absent provision cannot be supplied by the courts." *Id.* at 94. As a matter of statutory interpretation, "[t]o supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926).

In fact, Congress knew how to draft a more encompassing provision, and it did just that in another provision of the Adam Walsh Act, punishing a sex offender who "enters or leaves" Indian country. 18 U.S.C. § 2250(a)(2)(B). In light of its inclusion of "leaves" in § 2250(a)(2)(B), there is no reason to think that Congress's exclusion of "leaving" in § 16928 was accidental. *See, e.g.*, *Bates v. United States*, 522 U.S. 23, 29-30 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). And if

"entering the United States" in § 16928 actually means "entering or leaving the United States," then Congress's reference to "enters or leaves" in § 2250(a)(2)(B) renders the term "leaves" impermissibly superfluous. *United States v. Butler*, 297 U.S. 1, 65 (1936) ("These words cannot be meaningless, else they would not have been used.").

Instead, Congress's exclusion of "leaving" in § 16928 makes perfect sense. Sex offenders who *enter* the United States must register within three business days in jurisdictions where they reside, work, or attend school. 42 U.S.C. § 16913(c); *see also* 73 Fed. Reg. 38030-01 at 38065. For this reason, it is understandable that Congress would want to establish a notification system for offenders entering the country.

But there is no similar rationale for offenders *leaving* the country. SORNA's registration requirements do not apply to offenders who reside in foreign countries. 42 U.S.C. §§ 16911(10), 16913. Because these offenders will have no registration obligations under SORNA, *see* Section I(F), *supra*, it makes sense that Congress would exclude such offenders from § 16928's reach. Similarly, there would be no meaningful reason for Congress to require an offender to notify former jurisdictions of an international change of residence. *Lunsford*, 725 F.3d at 863 (observing that "when a sex offender leaves the country, he no longer poses an immediate threat to the safety of children in the United States").

Section 16928 is also important because it ensures that, if a sex offender who moves to a foreign country ever returns to the United States, the Attorney General and the Secretaries of State and Homeland Security will require him to register as a sex offender under § 16913(a). In this manner, and not via registration requirements for offenders who leave the country, SORNA's primary purpose – to create a "national" registration system in order to protect the public from sex offenders – is fulfilled. *See* 42 U.S.C. § 16901; Section II(B), *infra*.[13]

Finally, in § 2250(a), Congress made it a federal crime for a sex offender to travel in foreign commerce, and then fail to register as required by SORNA. 18 U.S.C. § 2250(a)(2)(B), (a)(3). *Carr* makes clear that the offender must first travel, and then fail to register, in order to violate this provision. 560 U.S. at 446. As a practical matter, this provision would apply to a sex offender who *enters* the United States and then fails to register, but not to an offender, like Mr. Nichols, who first fails to register and then *leaves* the

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[13] The 21-day travel notification provision in the supplemental guidelines also supports this point. 76 Fed. Reg. 1630-01 at 1633-1634. This information is relevant to § 16914, not § 16913, and so it is not information related to a "change of residence." 76 Fed. Reg. 1630-01 at 1637. The premise of the travel notification provision is thus that the offender will return to his home within the United States. Tracking that offender is different from tracking an offender who leaves the United States for good. The former is still subject to SORNA because he still resides within the United States, even while he vacations, works, etc., in a foreign country.

United States.[14] This disparate treatment is consistent with a reading of § 16913 that does not require a sex offender to register or keep a registration current in the former jurisdiction, but rather only to register or keep the registration current in the new jurisdiction.

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[14] At one point, the Justice Department's guidelines purport to rely on § 16928 and § 2250 as authority to supplement SORNA's requirements with a departure notification requirement. 73 Fed. Reg. 38030-01 at 38066. But § 16928 applies only to offenders "entering" the United States, not leaving the United States, and its aim is to ensure those people register, an aim that is impossible to achieve for offenders who move to foreign countries. Moreover, § 2250 is an enforcement provision, not a registration provision. Requiring additional registration information could not possibly be premised on an entirely separate enforcement provision.

In any event, the departure notification provision recommended by the guidelines would supplement SORNA's "minimum standards," not define those minimum standards. *Id.* at 38046. To the extent that one might read the guidelines to establish a federal obligation under SORNA, this would raise serious concerns about whether the guidelines deserve any deference whatsoever. *Lunsford*, 725 F.3d at 861 ("Neither the National Guidelines nor the government's brief in this case, however, grapple effectively with the language of the statute on this point, and we conclude that the text forecloses the government's position."); *see also Chevron USA Inc. v. Nat. Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984) (no agency deference when Congress has spoken on the issue presented); *Reynolds*, 132 S.Ct. at 986 (Scalia, J., dissenting) (suggesting that SORNA's delegation to the Attorney General to decide "whether a criminal statute will or will not apply to certain individuals" arguably violates the nondelegation doctrine).

B. A requirement that an offender notify his former jurisdiction that he has moved to a foreign country would not meaningfully advance SORNA's purposes.

SORNA's stated purpose is to establish a "comprehensive national" sex offender registration and notification system in order to protect the public (particularly children) from sex offenders. 42 U.S.C. § 16901. The seventeen instances of crimes against children enumerated in § 16901 all occurred within the United States. *Id.* There is no doubt that the protection of children is a laudable purpose, whether such children live in the United States or abroad. But there can also be no serious doubt that SORNA's purposes were never expressed in terms of the protection of children in other countries, and no reason to think that keeping a registration current in Kansas or some other jurisdiction would protect children in foreign countries.

Again, § 16901 is explicit: Congress sought to establish a "national" sex offender registration system, not an "international" sex offender registration system, and it did so in light of various crimes committed against children *within* the United States. In § 16928, Congress established a notification system for offenders *entering* the country, not for offenders *leaving* the country. And foreign countries are simply not covered jurisdictions under SORNA. 42 U.S.C. § 16911(10). As the Justice Department candidly admits, as currently drafted, a sex offender who moves to a foreign country "may not be subject to any

enforceable registration requirement under U.S. law unless and until he or she returns to the United States." 73 Fed. Reg. 38030-01 at 38066.

The guidelines set forth additional purposes served by SORNA, including: (1) tracking sex offenders "following their release into the community" "as they move among jurisdictions"; (2) assisting law enforcement in solving crimes against children; (3) deterring sex offenders from committing additional crimes; and (4) making information available to the community so that individuals can "take common sense measures" to protect their children (like decline an offer to babysit or head a youth group). 73 Fed. Reg. 38030-01 at 38044-38045.[15] But these purposes do not readily apply to sex offenders in foreign countries.

Instead, the first purpose concerns *interstate* tracking of sex offenders, not *international* tracking of sex offenders. There is also nothing within the

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[15] To the extent that it is considered, the legislative history also indicates that certain members of Congress were concerned with "missing" sex offenders (i.e., offenders not in compliance with sex offender registries), but even this concern was tied to interstate travel, not international travel. *See Carr*, 560 U.S. at 454-455. The legislative history is silent with respect to SORNA's application to offenders in foreign countries (no members of Congress cited the need to protect children in foreign countries as a reason to pass SORNA). Indeed, if Congress, as a whole, shared a concern about tracking sex offenders outside of the country, it surely would have regulated offenders "leaving" the United States via § 16928.

guidelines to suggest that the crime-control purposes are aimed at crimes committed outside of the United States. Finally, any "common sense measures" taken by the community would be taken *within* the community, not in foreign countries. Although somewhat perverse, the reality is that a sex offender in a foreign country actually furthers many of these stated purposes because there is no possibility that the sex offender will harm children within the United States. *See, e.g.*, *Lunsford*, 725 F.3d at 863 ("The government asserts no policy interest under SORNA in monitoring the offender's subsequent movements among foreign jurisdictions.").[16]

As Judge Lucero mentioned in dissent, it was arguably an "unspoken concern that Congress drafted SORNA with a loophole" that encouraged the Tenth Circuit to "rewrite the statute." *Murphy*, 664 F.3d at

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[16] Since SORNA's enactment in 2006, members of Congress have sought to amend § 16913 to include a registration provision for international travel, as well as to amend § 2250 to provide a federal enforcement provision for international travel. *See, e.g.*, Sex Offender Notification of International Travel Act, H.R. 6266, 111th Cong. (2010); Int'l Megan's Law of 2009, H.R. 1623, 111th Cong. (2009); Int'l Megan's Law of 2010, H.R. 5138, 111th Cong. Rec. H6087 (daily ed. July 27, 2010); Int'l Megan's Law to Prevent Demand for Child Sex Trafficking, H.R. 515 §§ 4, 7, 114th Cong. (2015); Int'l Megan's Law to Prevent Child Exploitation Through Advanced Notification of Traveling Sex Offenders, S. 1867, 114th Cong. (2015) (introduced July 27, 2015). Unlike SORNA, this legislation is aimed at protecting children in other countries (principally from so-called sex tourism). This proposed legislation eliminates any suggestion that one of SORNA's purposes was to protect children in foreign countries.

807. But this "loophole" is overstated. Although the change of residence to a foreign country effectively removes the offender from SORNA's requirements, it is not as if the government is unaware when an offender leaves the country, as one can only do so using a passport issued by the State Department. *See* 22 U.S.C. § 211a.[17] The guidelines require states to collect passport information in order to track and identify offenders "who leave the United States." 73 Fed. Reg. 38030-01 at 38056. Since 2009, U.S. Customs has provided to federal law enforcement officials "information such as name, date of birth, destination, and offense, on all registered sex offenders" identified from passenger data.[18] The government is thus aware when a registered sex offender crosses an international border, knowledge it does not have for interstate travel.

As a practical matter, the sex offender in a foreign country is essentially analogous to a sex offender who has died. Both are beyond the reach of SORNA,

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[17] For a compelling read on the extent to which the government tracks its citizens traveling internationally, *see* Sean O'Neill, *A rare peek at Homeland Security's files on travelers*, Budget Travel's Blog, *at* http://www.budgettravel.com/blog/a-rare-peek-at-homeland-securitys-files-on-travelers,10313/ (last visited December 19, 2015).

[18] USGAO, *Registered Sex Offenders: Sharing More Information Will Enable Federal Agencies to Improve Notifications of Sex Offenders' International Travel* 17 (February 2013), *available at* http://www.gao.gov/assets/660/652194.pdf; *see also* 19 C.F.R. § 122.75a (directing commercial airlines to transmit passenger manifests to U.S. Customs and Border Patrol).

but nonetheless easy to trace. With respect to the latter, the guidelines encourage jurisdictions "to promptly update the information in the registry . . . to reflect the registrant's death" when such an offender fails to appear for a scheduled update. 73 Fed. Reg. 38030-01 at 38068. The guidelines presume that the offender's failure to appear will prompt a simple vital records search, which will in turn alert the jurisdiction to the offender's death. Jurisdictions can just as easily search (or ask the federal government to search) the international travel records of a missing offender. 73 Fed. Reg. 38030-01 at 38068; *see* n.17, *supra*.

In the end, it is not unheard of for Congress to "leave some matters uncovered" when drafting legislation. *See* Scalia & Garner at 57. "[T]he limitations of a text – what a text chooses *not* to do – are as much a part of its 'purpose' as its affirmative dispositions. These exceptions or limitations must be respected, and the only way to accord them their due is to reject the replacement or supplementation of text with purpose." *Id.* at 57-58. Here, despite the value in seeking to protect children in foreign countries, there is nothing within SORNA's text, legislative history, or statutory history to indicate that Congress intended to do so when it passed SORNA. Without that purpose, it should come as no surprise that § 16913's registration requirements do not reach sex offenders, like Mr. Nichols, who move to foreign countries.

C. SORNA's statutory history confirms that SORNA does not require an offender to register or keep a registration current in a former jurisdiction when the offender moves to a foreign country, and, to the extent that this supplemental requirement exists, it is enforced by the states, not the federal government.

SORNA's statutory history is important for two reasons. First, it demonstrates that Congress knew how to draft a departure notification provision, but chose not to include such a provision in SORNA. Second, it demonstrates that such provisions are supplemental requirements enforced by the states, not the federal government.

1. Unlike the Wetterling Act as amended, SORNA does not require a sex offender to report a change of residence to the jurisdiction "the person is leaving."

The Wetterling Act and SORNA share many similarities. *See Kebodeaux*, 133 S.Ct. at 2504-2505. With respect to registration requirements, SORNA includes a modified grace-period provision like the one found in the Wetterling Act (the original version and as amended). *Compare* 42 U.S.C. § 16913, *with* 42 U.S.C. § 14071(a), (b)(5) (1994), 42 U.S.C. § 14072(g)(3), (i)(3), (i)(4) (2000). The provisions similarly require sex offenders to register "current" addresses and to register new addresses in different states within

some set amount of time (ten days under the Wetterling Act; three business days under SORNA) in the new state or jurisdiction (where the offender "resides," works, or attends school), but not the former state or jurisdiction. *Id.* State registries notified of changes of residence have a further duty to notify law enforcement officials and jurisdictions "from which" and "to which" the offender relocated. *Compare* 42 U.S.C. § 14072(g)(4), (5) (2000), *with* 42 U.S.C. § 16921(b)(3).

Although similar in many respects, SORNA differs from the Wetterling Act as amended in one significant respect. Whereas the original version of § 14071(b)(5) of the Wetterling Act directed states to require offenders to register within ten days of a change of residence in the new state, in 1997, Congress amended § 14071(b)(5) to direct states to require an offender who moves to another state to "report the change of address to the responsible agency in the State the person is leaving." Pub. L. No. 105-119, Tit. I, 111 Stat. 2440. When Congress enacted SORNA, however, it did not adopt or otherwise include a similar departure notification provision in the legislation. There is no provision within SORNA that requires a sex offender who moves to a different jurisdiction or to a foreign country to report the change of residence to the jurisdiction "the person is leaving." Congress chose the Wetterling Act's grace-period structure instead. 42 U.S.C. § 16913(c).

This statutory history thus demonstrates that Congress knew how to draft a departure notification

provision but chose not to do so in SORNA. Indeed, Congress repealed such a provision when it enacted SORNA. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Quality Stores, Inc.*, 134 S.Ct. at 1401. In *Quality Stores*, for instance, this Court refused to read into a statute an exception that once existed, but that Congress later repealed. *Id.* So too here, this Court should refuse to read into SORNA a provision that once existed but that Congress later repealed. *See Kebodeaux*, 133 S.Ct. at 2504-2505 (applying SORNA's provisions, rather than the Wetterling Act's provisions, to a federal sex offender convicted before SORNA's enactment); *id.* at 2510 (Scalia, J., dissenting) (referring to the proposition that "SORNA is designed to carry the Wetterling Act into execution" as "obviously untrue").

This is particularly true here because, by the time Congress enacted SORNA, it had not just the Wetterling Act as a model, but also a variety of state registry laws from which to choose. *See* notes 1 & 2, *supra*. Two states explicitly required departure notification for moves *to foreign countries*. W. Va. Code § 15-12-7 (2004); Wash. Rev. Code § 9A.44.130(4)(a)(ix) (2003). Congress easily could have drafted a similar provision in SORNA. But Congress instead chose a system in which offenders would report changes of residence "after" the change and to the jurisdiction in which the offender "resides," not to the jurisdiction in which the offender formerly resided. *See* Section I, *supra*. Congress's decision deserves deference.

Quality Stores, Inc., 134 S.Ct. at 1401; *Hamdan v. Rumsfeld*, 548 U.S. 557, 579-580 (2006) ("Congress' rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation.").

Moreover, SORNA's statutory history demonstrates that Congress knows how to amend a registration law to include a departure notification provision. *Compare* 42 U.S.C. § 14071(b)(5) (1994), *with* 42 U.S.C. § 14071(b)(5) (1998). Yet, in the last nine years, although Congress has added three additional provisions to SORNA, *see* 42 U.S.C. §§ 16915a & 16915b (added in 2008); 42 U.S.C. § 16928a (added in 2015), it has not amended SORNA to include a departure notification provision. *See, e.g.*, *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996) (refusing to interpret a statute a certain way because Congress demonstrated that it knew how to provide for that interpretation of the statute but did not.). Nor has Congress amended SORNA to address offenders living abroad, even though it just added § 16928a to address military sex offenders.[19]

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[19] In his concurrence in *Kebodeaux*, Justice Alito explained that states have no authority to require military tribunals or military officials to notify state registries when military sex offenders are released from prison. 133 S.Ct. at 2509. Justice Alito suggested that this "may create a gap in the" sex offender registry laws. *Id.* Less than two years later, Congress enacted § 16928a, requiring the Secretary of Defense to notify the Attorney General of military personnel who are required to register under SORNA. The Attorney General, in turn, is obligated to

(Continued on following page)

This statutory history consistently undermines the Tenth Circuit's decision below and in *Murphy*. Had Congress wanted a provision like the one the Tenth Circuit crafted, requiring an offender to report a change of residence to the former jurisdiction, it would have enacted the provision on its own.

2. Any departure notification requirement is a supplemental requirement enforced by the states, and not one "required by" SORNA.

The amended Wetterling Act's departure notification provision was not a federally enforced provision. The provision was codified in § 14071, not § 14072, and only § 14072 created a federal penalty for failure to register. *Compare* 42 U.S.C. § 14071(d), *with* 42 U.S.C. § 14072(i). In states that codified § 14071(b)(5) (requiring, *inter alia*, notification that a "person is leaving" the state), an offender's failure to abide by it could result in state prosecution, not federal prosecution. 42 U.S.C. § 14071(d); *see Carr*, 560 U.S. at 452-453. Unlike § 14071(b)(5), § 14072 did not require an offender to notify the former state of the change of

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notify "all relevant jurisdictions" of this information. 42 U.S.C. § 16919(b). Thus, Congress' passage of § 16928a confirms that Congress, not courts, fill perceived legislative gaps. *See* Scalia & Garner at 95-96. ("The search for what the legislature 'would have wanted' is invariably either a deception or a delusion. What is a gap anyway?" "Judicial amendment flatly contradicts democratic self-governance.").

residence. Instead, a state agency was required to notify "law enforcement officials of the jurisdiction to which, and the jurisdiction from which, the person has relocated." 42 U.S.C. § 14072(g)(4), (5) (1998).

Not surprisingly, SORNA adopted a registration system similar to the federally enforced registration requirements in the Wetterling Act as amended. *See Kebodeaux*, 133 S.Ct. at 2501, 2504-2505. Again, while Congress shortened the Wetterling Act's ten-day deadline to register a new address to a three-business-day deadline, it left intact the requirement to register where an offender "resides," works, or attends school. *Compare* 42 U.S.C. § 14071(b)(5), 42 U.S.C. § 14072(g)(3), & 42 U.S.C. § 14072(i)(3), (4) *with* 42 U.S.C. § 16913(a), (c). Moreover, it is still the responsibility of the jurisdiction to provide any updated information on a sex offender to the Attorney General, each jurisdiction where the offender resides, works, or attends school, and, *inter alia*, "each jurisdiction *from or to which* a change of residence, employment, or student status occurs." *Compare* 42 U.S.C. § 16921(b)(1), (2), (3) (emphasis added), *with* 42 U.S.C. § 14071(b)(5). SORNA also adopts the amended Wetterling Act's bifurcated enforcement scheme. 42 U.S.C. § 16913(e); 18 U.S.C. § 2250(a).

This statutory history demonstrates that departure notification provisions have historically been a part of state law, not federal law. 42 U.S.C. § 14071(d). If an offender is required to give departure notification to the jurisdiction where he resides, or the jurisdiction where he resided, this requirement

comes from state law, and the failure to abide by the requirement must be prosecuted in state court, not federal court. *See Reynolds*, 132 S.Ct. at 979 (failure to give Missouri authorities notification of move to Pennsylvania "as Missouri law required"); Scalia & Garner at 290 ("A federal statute is presumed to supplement rather than displace state law."). There is no need to adopt a contorted interpretation of § 16913 to include a similar federal obligation when that obligation exists under state law. *See, e.g.*, Kan. Stat. Ann. § 22-4905(g); *Kebodeaux*, 133 S.Ct. at 2513 (Thomas, J., dissenting) ("The power to protect society from sex offenders is part of the general police power that the Framers reserved to the States or the people.").

The Justice Department's guidelines recognize this point. The guidelines note that a "jurisdiction may require that changes in registration information be reported by registrants on a more stringent basis than the SORNA minimum standards – *e.g.*, requiring that changes of residence be reported before the sex offender moves, rather than within three business days following the move." 73 Fed. Reg. 38030-01 at 38046. Beyond SORNA's "minimum standards," "the manner in which sex offenders are to report other changes in registration information is a matter within jurisdictions' discretion." *Id.* at 38044. The guidelines explicitly apply this rationale to "sex offenders who leave the United States." *Id.* at 38067 (noting

that such changes of residence are not ones "between or within jurisdictions" for purposes of SORNA).[20]

When SORNA is understood in light of its history, the Tenth Circuit's perceived "loophole," *Murphy*, 664 F.3d at 807 (Lucero, J., dissenting), is no loophole at all. State registration laws sufficiently fill any perceived gap in federal coverage. *See* notes 1 & 2, *supra*. If Mr. Nichols had an obligation to give the state of Kansas notification of his change of residence to the Philippines, that obligation arose under state law, not SORNA. *See* Kan. Stat. Ann. § 22-4905(g); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").

III. Any ambiguity in the statute must be resolved in favor of Mr. Nichols.

As explained above, SORNA's text plainly does not turn Mr. Nichols's failure to inform Kansas of his move to the Philippines into a federal crime. Because

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[20] Moreover, as mentioned above, legislation proposed since SORNA's enactment has sought to amend § 16913 to include a registration provision for international travel, as well as to amend § 2250 to provide a federal enforcement provision for international travel. *See* note 16, *supra*. It would make little sense for members of Congress to introduce such legislation if SORNA already required these things.

Kansas was a former jurisdiction, Mr. Nichols had no federal obligation to report a change of residence to Kansas. A different statutory reading, one that would subject Mr. Nichols to federal prosecution for moving to a foreign country without informing Kansas, would be highly doubtful. And doubt about the substantive scope of a federal statute must be resolved in favor of Mr. Nichols.

"Ambiguous criminal laws are to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion). This "ensures that criminal statutes will provide fair warning of what constitutes criminal conduct, minimizes the risk of selective or arbitrary enforcement, and strikes the appropriate balance between the legislature and the court in defining criminal liability." *United States v. Valle*, ___ F.3d ___, 2015 WL 7774548 at *13 (2d Cir. Dec. 3, 2015) (citing *Yates v. United States*, 135 S.Ct. 1074, 1088 (2015)). Congress, after all, drafts and enacts statutes. Its responsibility is to write laws in "language that is clear and definite," *Yates*, 135 S.Ct. at 1088, so as to identify the boundaries of criminal conduct that should be penalized. This ensures that legislatures, not courts, define criminal liability. *Liparota v. United States*, 471 U.S. 419, 427 (1985).

"[W]here text, structure, and history fail to establish that the Government's position is *unambiguously correct*," the rule of lenity resolves the ambiguity in the defendant's favor. *United States v. Granderson*, 511 U.S. 39, 54 (1994) (emphasis added). This "venerable

rule" assures that "no citizen shall be held accountable for a violation of a statute whose commands are uncertain. . . ." *Santos*, 553 U.S. at 514. A law must clearly inform what conduct is criminalized: "A fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). And when Congress fails to make that line clear, the rule of lenity requires the Court to draw it to the defendant's benefit.

The rule also serves a corrective role. By placing the burden on the government, "the weight of inertia [is] upon the party that can best induce Congress to speak more clearly and keep courts from making laws in Congress's stead." *Santos*, 553 U.S. at 514. When Congress speaks "in language that is clear and definite," courts may impose the harsher alternative construction. *United States v. Bass*, 404 U.S. 336, 347 (1971). But when Congress fails to unambiguously define criminal activity, courts are forced to sort out the matter. *Id.* at 348. And in that instance, because the Court "does not play the part of a mindreader," *Santos*, 553 U.S. at 515, the rule of lenity resolves ambiguity in favor of the defendant.

Even when the Court may divine plausible alternative constructions of an uncertain statute, the rule of lenity calls for the Court to "reject the impulse to speculate regarding dubious Congressional intent." *Santos*, 553 U.S. at 514 (quoting *United States v.*

Wiltberger, 18 U.S. 76, 105 (1820)). The law does not allow for a preponderance or even probability appraisal of Congress's objective. "Probability is not a guide which a court, in construing a penal statute, can safely take." *Id.*

There is nothing in SORNA's text, purpose, or statutory history that unambiguously demonstrates Congress's intent to criminalize Mr. Nichols's conduct in this case. SORNA's registration provisions do not require an offender to update his registration in jurisdictions where he no longer resides. 42 U.S.C. § 16913. And that is particularly true when a sex offender no longer resides in a SORNA-covered jurisdiction. 42 U.S.C. §§ 16911(10), 16928. If nothing else, the rule of lenity cautions against criminalizing conduct not clearly required by Congress. *Bass*, 404 U.S. at 348 (noting the "instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.").

CONCLUSION

For the above-stated reasons, this Court should reverse the Tenth Circuit's judgment affirming Mr. Nichols's conviction.

Respectfully submitted,

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STATUTORY APPENDIX

18 U.S.C.A. § 2250

Failure to register

(a) In general. – Whoever –

(1) is required to register under the Sex Offender Registration and Notification Act;

(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act; shall be fined under this title or imprisoned not more than 10 years, or both.

(b) Affirmative defense. – In a prosecution for a violation under subsection (a), it is an affirmative defense that –

(1) uncontrollable circumstances prevented the individual from complying;

(2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and

(3) the individual complied as soon as such circumstances ceased to exist.

(c) **Crime of violence.** –

(1) **In general** – An individual described in subsection (a) who commits a crime of violence under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States shall be imprisoned for not less than 5 years and not more than 30 years.

(2) **Additional punishment.** – The punishment provided in paragraph (1) shall be in addition and consecutive to the punishment provided for the violation described in subsection (a).

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42 U.S.C.A. § 16901

Declaration of purpose

In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this chapter establishes a comprehensive national system for the registration of those offenders:

(1) Jacob Wetterling, who was 11 years old, was abducted in 1989 in Minnesota, and remains missing.

(2) Megan Nicole Kanka, who was 7 years old, was abducted, sexually assaulted, and murdered in 1994, in New Jersey.

(3) Pam Lychner, who was 31 years old, was attacked by a career offender in Houston, Texas.

(4) Jetseta Gage, who was 10 years old, was kidnapped, sexually assaulted, and murdered in 2005, in Cedar Rapids, Iowa.

(5) Dru Sjodin, who was 22 years old, was sexually assaulted and murdered in 2003, in North Dakota.

(6) Jessica Lunsford, who was 9 years old, was abducted, sexually assaulted, buried alive, and murdered in 2005, in Homosassa, Florida.

(7) Sarah Lunde, who was 13 years old, was strangled and murdered in 2005, in Ruskin, Florida.

(8) Amie Zyla, who was 8 years old, was sexually assaulted in 1996 by a juvenile offender in Waukesha, Wisconsin, and has become an advocate for child victims and protection of children from juvenile sex offenders.

(9) Christy Ann Fornoff, who was 13 years old, was abducted, sexually assaulted, and murdered in 1984, in Tempe, Arizona.

(10) Alexandra Nicole Zapp, who was 30 years old, was brutally attacked and murdered in a public restroom by a repeat sex offender in 2002, in Bridgewater, Massachusetts.

(11) Polly Klaas, who was 12 years old, was abducted, sexually assaulted, and murdered in 1993 by a career offender in California.

(12) Jimmy Ryce, who was 9 years old, was kidnapped and murdered in Florida on September 11, 1995.

(13) Carlie Brucia, who was 11 years old, was abducted and murdered in Florida in February, 2004.

(14) Amanda Brown, who was 7 years old, was abducted and murdered in Florida in 1998.

(15) Elizabeth Smart, who was 14 years old, was abducted in Salt Lake City, Utah in June 2002.

(16) Molly Bish, who was 16 years old, was abducted in 2000 while working as a lifeguard in Warren, Massachusetts, where her remains were found 3 years later.

(17) Samantha Runnion, who was 5 years old, was abducted, sexually assaulted, and murdered in California on July 15, 2002.

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42 U.S.C.A. § 16911

Relevant definitions, including Amie Zyla expansion of sex offender definition and expanded inclusion of child predators

In this subchapter the following definitions apply:

(1) Sex offender

The term "sex offender" means an individual who was convicted of a sex offense.

(2) Tier I sex offender

The term "tier I sex offender" means a sex offender other than a tier II or tier III sex offender.

(3) Tier II sex offender

The term "tier II sex offender" means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and –

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

(i) sex trafficking (as described in section 1591 of Title 18);

(ii) coercion and enticement (as described in section 2422(b) of Title 18);

(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a)) of Title 18;

(iv) abusive sexual contact (as described in section 2244 of Title 18);

(B) involves –

(i) use of a minor in a sexual performance;

(ii) solicitation of a minor to practice prostitution; or

(iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a tier I sex offender.

(4) Tier III sex offender

The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and –

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or

(ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a tier II sex offender.

(5) Amie Zyla expansion of sex offense definition

(A) Generally

Except as limited by subparagraph (B) or (C), the term " sex offense" means –

(i) a criminal offense that has an element involving a sexual act or sexual contact with another;

(ii) a criminal offense that is a specified offense against a minor;

(iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of Title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of Title 18;

(iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or

(v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

(B) Foreign convictions

A foreign conviction is not a sex offense for the purposes of this subchapter if it was not obtained with sufficient safeguards for fundamental fairness and due process for the accused under guidelines or regulations established under section 16912 of this title.

(C) Offenses involving consensual sexual conduct

An offense involving consensual sexual conduct is not a sex offense for the purposes of this subchapter if the victim was an adult, unless the adult was under the custodial authority of the offender at the time of the

offense, or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.

(6) Criminal offense

The term "criminal offense" means a State, local, tribal, foreign, or military offense (to the extent specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note)) or other criminal offense.

(7) Expansion of definition of "specified offense against a minor" to include all offenses by child predators

The term "specified offense against a minor" means an offense against a minor that involves any of the following:

(A) An offense (unless committed by a parent or guardian) involving kidnapping.

(B) An offense (unless committed by a parent or guardian) involving false imprisonment.

(C) Solicitation to engage in sexual conduct.

(D) Use in a sexual performance.

(E) Solicitation to practice prostitution.

(F) Video voyeurism as described in section 1801 of Title 18.

(G) Possession, production, or distribution of child pornography.

(H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.

(I) Any conduct that by its nature is a sex offense against a minor.

(8) Convicted as including certain juvenile adjudications

The term "convicted" or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of Title 18), or was an attempt or conspiracy to commit such an offense.

(9) Sex offender registry

The term "sex offender registry" means a registry of sex offenders, and a notification program, maintained by a jurisdiction.

(10) Jurisdiction

The term "jurisdiction" means any of the following:

(A) A State.

(B) The District of Columbia.

(C) The Commonwealth of Puerto Rico.

(D) Guam.

(E) American Samoa.

(F) The Northern Mariana Islands.

(G) The United States Virgin Islands.

(H) To the extent provided and subject to the requirements of section 16927 of this title, a federally recognized Indian tribe.

(11) Student

The term "student" means an individual who enrolls in or attends an educational institution, including (whether public or private) a secondary school, trade or professional school, and institution of higher education.

(12) Employee

The term "employee" includes an individual who is self-employed or works for any other entity, whether compensated or not.

(13) Resides

The term "resides" means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives.

(14) Minor The term "minor" means an individual who has not attained the age of 18 years.

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42 U.S.C.A. § 16913

Registry requirements for sex offenders

(a) In general

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration

The sex offender shall initially register –

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) Initial registration of sex offenders unable to comply with subsection (b) of this section

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.

(e) State penalty for failure to comply

Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

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42 U.S.C.A. § 16928

Registration of sex offenders entering the United States

The Attorney General, in consultation with the Secretary of State and the Secretary of Homeland Security, shall establish and maintain a system for informing the relevant jurisdictions about persons entering the United States who are required to register under this subchapter. The Secretary of State and the Secretary of Homeland Security shall provide such information

and carry out such functions as the Attorney General may direct in the operation of the system.

No. 15-5238

In the Supreme Court of the United States

LESTER RAY NICHOLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner violated 18 U.S.C. 2250(a) by failing to update his sex-offender registration under the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*, when he abandoned his residence in Kansas and moved to the Philippines.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory and regulatory provisions involved 1
Statement 2
Summary of argument 10
Argument:
A registered sex offender violates his obligation under SORNA to keep his registration current when he abandons his U.S. residence and relocates to a foreign country without reporting that change of residence 13
A. SORNA's text, structure, and context require a registered sex offender to inform at least one registration jurisdiction when he abandons his residence of record for one in a foreign country 14
1. SORNA requires sex offenders to keep their registration information "current" by providing notice of each "change" of residence 15
2. A sex offender's abandonment of a registered address constitutes a "change" in residence even before he has decided upon or arrived at a new address 16
3. SORNA expressly contemplates the furnishing of registration information about a future address 17
4. A sex offender who abandons his residence of record and does not establish a new residence within a SORNA jurisdiction during the grace period must timely inform his departure jurisdiction of the change of address 21
5. The foregoing construction is consistent with *Carr*, with the Attorney General's guidelines, and with Section 16928 26

Table of Contents—Continued: Page

B. Requiring a sex offender to give notice that he will no longer reside at his address of record furthers SORNA's purposes 31
C. The statutory history does not support petitioner's reading of Section 16913 37
D. The rule of lenity has no application to this case 40
Conclusion 42
Appendix — Statutory and regulatory provisions 1a

TABLE OF AUTHORITIES

Cases:

Abbott v. *United States*, 562 U.S. 8 (2010) 41
Abramski v. *United States*, 134 S. Ct. 2259 (2014) 40
Arthur Andersen LLP v. *United States*, 544 U.S. 696 (2005) 41
Caron v. *United States*, 524 U.S. 308 (1998) 41
Carr v. *United States*, 560 U.S. 438 (2010) 5, 26, 27, 28, 32
McKune v. *Lile*, 536 U.S. 24 (2002) 2
Reynolds v. *United States*, 132 S. Ct. 975 (2012) ..... *passim*
Robers v. *United States*, 134 S. Ct. 1854 (2014) 40
Smith v. *Doe*, 538 U.S. 84 (2003) 2
United States v. *Hayes*, 555 U.S. 415 (2009) 40, 41
United States v. *Kebodeaux*, 133 S. Ct. 2496 (2013) 2, 27, 38
United States v. *Lewis*, 768 F.3d 1086 (10th Cir. 2014), cert. denied, 135 S. Ct. 1513 (2015) 28
United States v. *Murphy*, 664 F.3d 798 (10th Cir. 2011) 9, 18
United States v. *Van Buren*, 599 F.3d 170 (2d Cir.), cert. denied, 562 U.S. 971 (2010) 16, 32

Cases—Continued: Page

United States v. *Voice*, 622 F.3d 870 (8th Cir. 2010), cert. denied, 562 U.S. 1206 (2011) 16
Utility Air Regulatory Grp. v. *Environmental Prot. Agency*, 134 S. Ct. 2427 (2014) 14

Statutes and regulation:

Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, § 1601, 114 Stat. 1537 3
Department of Justice Appropriations Act, 1998, Pub. L. No. 105-119, Tit. I, § 115(a), 111 Stat. 2461 3
Dictionary Act, 1 U.S.C. 1 19
Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, § 170101, 108 Stat. 2038 2
42 U.S.C. 14071(b)(5) (2006) (repealed 2009) 37, 13a
Megan's Law, Pub. L. No. 104-145, § 2, 110 Stat. 1345 3
Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, § 2, 110 Stat. 3093 3
PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650:
§ 604, 117 Stat. 688 3
§ 605, 117 Stat. 688 3
Sex Offender Registration and Notification Act, Pub. L. No. 109-248, Tit. I, 120 Stat. 590 (42 U.S.C. 16901 *et seq.*) 4, 10, 13
42 U.S.C. 16901 ..... 31, 2a
42 U.S.C. 16911(10) 4, 5a
42 U.S.C. 16911(13) 15, 6a
42 U.S.C. 16912 ..... 39, 6a
42 U.S.C. 16913 ..... *passim*, 7a
42 U.S.C. 16913(a) ..... *passim*, 7a

Statutes and regulation—Continued: Page

42 U.S.C. 16913(b) 20, 7a
42 U.S.C. 16913(c) ..... *passim*, 7a
42 U.S.C. 16913(d) 5, 20, 8a
42 U.S.C. 16913(e) 39, 8a
42 U.S.C. 16914 ..... 19, 8a
42 U.S.C. 16914(a)(3) 11, 15, 19, 20, 26, 9a
42 U.S.C. 16914(a)(3)-(5) 5, 9a
42 U.S.C. 16914(a)(4) 17, 9a
42 U.S.C. 16914(a)(4)-(5) 19, 9a
42 U.S.C. 16914(a)(7) 5, 6, 19, 9a
42 U.S.C. 16916 34
42 U.S.C. 16921(b)(3) 22, 25, 33, 38, 11a
42 U.S.C. 16922 ..... 34, 12a
42 U.S.C. 16925 39
42 U.S.C. 16928 ..... 29, 30, 35, 12a
42 U.S.C. 16941(a) 34, 13a
18 U.S.C. 2250 ..... 26, 30, 39, 1a
18 U.S.C. 2250(a) 2, 8, 13, 27, 1a
18 U.S.C. 2250(a)(1)-(3) 5, 1a
18 U.S.C. 2250(a)(2)(A) 27, 1a
18 U.S.C. 2250(a)(2)(B) 27, 28, 30, 1a
18 U.S.C. 2423(b) 7
18 U.S.C. 2423(c) 34
Kan. Stat. Ann. § 22-4905(g) (Supp. 2013) 25
28 C.F.R. 72.3 ..... 5, 7

Miscellaneous:

152 Cong. Rec. 15,713 (2006) 31, 32
161 Cong. Rec.:
H542-H544 (daily ed. Jan. 26, 2015) 40

Miscellaneous—Continued: Page

S8831-S8834 (daily ed. Dec. 17, 2015) 40
72 Fed. Reg. 8897 (Feb. 28, 2007) 5
75 Fed. Reg. 81,849 (Dec. 29, 2010) 5
H.R. Rep. No. 218, Pt. 1, 109th Cong., 1st Sess. (2005) 3, 31, 32
International Megan's Law to Prevent Demand for Child Sex Trafficking, H.R. 515, 114th Cong. (2015) 40
The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. (July 2, 2008):
p. 38,030 6
pp. 38,035-38,036 6
p. 38,044 ..... 32, 33
p. 38,046 ..... 6, 29
p. 38,055 20
p. 38,056 35
p. 38,063 6
p. 38,065 ..... 6, 20, 17a-21a
p. 38,066 ..... 6, 22, 23, 29, 35, 21a-24a
p. 38,067 ..... 6, 20, 30, 35, 40, 24a-25a
p. 38,068 36
p. 38,069 34
3 *Oxford English Dictionary* (2d ed. 1989) 16
Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. (Jan. 11, 2011):
p. 1630 6
p. 1637 ..... 7, 35, 40
Webster's Third New International Dictionary (2002) 16

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 117-133) is reported at 775 F.3d 1225. The opinions accompanying the order of the court of appeals denying rehearing (J.A. 135-159) are reported at 784 F.3d 666. The order of the district court denying petitioner's motion to dismiss the indictment (J.A. 54-64) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2014. A petition for rehearing was denied on April 15, 2015 (J.A. 134-135). The petition for a writ of certiorari was filed on July 14, 2015, and was granted on November 6, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory provisions and portions of guidelines promulgated by the Attorney General are

set forth in an appendix to this brief. App., *infra*, 1a-25a.

STATEMENT

Following a conditional guilty plea in the United States District Court for the District of Kansas, petitioner was convicted of failing to update his registration as a sex offender, in violation of 18 U.S.C. 2250(a). He was sentenced to ten months of imprisonment, to be followed by five years of supervised release. J.A. 104-106. The court of appeals affirmed. J.A. 117-133.

1. a. "Sex offenders are a serious threat to this Nation," *McKune* v. *Lile*, 536 U.S. 24, 32-33 (2002) (plurality opinion), and present "public safety concerns," *United States* v. *Kebodeaux*, 133 S. Ct. 2496, 2503 (2013). As a result, Congress has frequently enacted legislation to encourage and assist States in tracking locations where sex offenders live, work, and study and making that information available to the public "for its own safety." *Smith* v. *Doe*, 538 U.S. 84, 99 (2003).

In the 1990s, state sex-offender-registration laws became known as "Megan's Laws," after a seven-year-old girl who was sexually assaulted and murdered by a neighbor who, unbeknownst to her family, had prior convictions for child sex offenses. See *Smith*, 538 U.S. at 89. In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act), Pub. L. No. 103-322, § 170101, 108 Stat. 2038. The Wetterling Act encouraged States, as a condition of receiving federal funds, to adopt sex-offender-registration laws meeting certain minimum standards. See *Smith*, 538 U.S. at 89-90. By 1996, every State and the District of Columbia had enacted a registration law. *Id.* at 90.

In 1996, Congress bolstered the minimum federal standards by adding a mandatory community-notification provision. See Megan's Law, Pub. L. No. 104-145, § 2, 110 Stat. 1345. Congress also strengthened the national effort to ensure registration of sex offenders by directing the FBI to create a national sex-offender database, requiring lifetime registration for certain offenders, and making the failure of certain persons to register a federal crime. See Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, § 2, 110 Stat. 3093. Later statutes further enhanced federal registration and notification requirements.[1]

Despite those efforts, Congress grew concerned about "loopholes and deficiencies" in the existing registration and notification statutes, which resulted in an estimated 100,000 sex offenders becoming "missing" or "lost." H.R. Rep. No. 218, Pt. 1, 109th Cong., 1st Sess. 20, 26 (2005) (*House Report*). The House Judiciary Committee described the missing offenders as "[t]he most significant enforcement issue in the sex offender program." *Id.* at 26. The Committee concluded that "there is a strong public interest in finding" those missing offenders "and having them register with current information to mitigate the risks of additional crimes against children." *Id.* at 24.

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[1] See, *e.g.*, Department of Justice Appropriations Act, 1998, Pub. L. No. 105-119, Tit. I, § 115(a), 111 Stat. 2461 (requiring, *inter alia*, sex offenders to register in States where they work or are students, in addition to their States of residence); Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, § 1601, 114 Stat. 1537 (requiring sex offenders to provide notice of institutions of higher education at which they work or are students); PROTECT Act, Pub. L. No. 108-21, §§ 604-605, 117 Stat. 688 (requiring registry information to be available on the Internet).

b. In 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), Pub. L. No. 109-248, Tit. I, 120 Stat. 590 (42 U.S.C. 16901 *et seq.*). SORNA was intended to make "more uniform and effective" the "patchwork" of federal and state sex-offender registration systems already in effect. *Reynolds* v. *United States*, 132 S. Ct. 975, 978 (2012). To that end, SORNA "repeal[ed] several earlier federal laws that also (but less effectively) sought uniformity; [set] forth comprehensive registration-system standards; * * * [and required] both state and federal sex offenders to register with relevant jurisdictions (and to keep registration information current)." *Ibid.*

The "jurisdiction[s]" to which SORNA applies are the States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, the United States Virgin Islands, and federally recognized Indian tribes that satisfy certain criteria. 42 U.S.C. 16911(10). A foreign country is not such a "jurisdiction."

SORNA requires that every "sex offender shall register, *and keep the registration current*, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. 16913(a) (emphasis added). A subsection entitled "Keeping the registration current" provides:

> A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry.

42 U.S.C. 16913(c).

SORNA specifies that the information a sex offender is required to provide "to the appropriate official for inclusion in the sex offender registry" includes, *inter alia*, "[t]he address of each residence at which the sex offender resides or will reside," the "name and address of any place where the sex offender is * * * or will be an employee" or "is * * * or will be a student," and "[a]ny other information required by the Attorney General." 42 U.S.C. 16914(a)(3)-(5) and (7).

c. Congress also created a federal criminal offense penalizing noncompliance with SORNA's registration requirements. That provision applies to any person who "knowingly fails to register or update a registration as required by [SORNA]" if that person is a sex offender by virtue of a conviction under federal or tribal law or if he "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country." 18 U.S.C. 2250(a)(1)-(3). In *Carr* v. *United States*, 560 U.S. 438 (2010), the Court held that, for those who do not have federal or tribal sex-offense convictions, the interstate travel referred to in that provision must occur after SORNA took effect and required the sex offender to register. *Id.* at 458. In *Reynolds*, the Court held that sex offenders with pre-SORNA convictions were not required to register under SORNA until the Attorney General, acting under 42 U.S.C. 16913(d), "validly specifie[d] that the Act's registration provisions apply to them." 132 S. Ct. at 980.

In a rule issued on an interim basis in 2007 and finalized in 2010, the Attorney General specified SORNA's applicability to those with pre-SORNA convictions. 28 C.F.R. 72.3; see 72 Fed. Reg. 8897 (Feb. 28, 2007); 75 Fed. Reg. 81,849 (Dec. 29, 2010). In 2008,

after public notice and comment, the Attorney General promulgated final guidelines for the States and other jurisdictions on matters of SORNA's implementation, which reaffirmed SORNA's applicability to all sex offenders. See *The National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38,030, 38,035-38,036, 38,046, 38,063 (July 2, 2008).

In explaining the requirement that registrations be kept current, the guidelines observe that registries should not "contain outdated information showing sex offenders to be residing, employed, or attending school in places where they no longer are." 73 Fed. Reg. at 38,066. To that end, the guidelines instruct registration jurisdictions that a sex offender must inform them "if the sex offender intends to commence residence, employment, or school attendance in another jurisdiction"; "if the sex offender is terminating residence, employment, or school attendance in the jurisdiction, even if there is no ascertainable or expected future place of residence, employment, or school attendance for the sex offender"; or "if the sex offender intends to commence residence, employment, or school attendance outside of the United States." *Id.* at 38,065, 36,066, 38,067.

In 2011, after additional notice and comment, the Attorney General promulgated supplemental guidelines. *Supplemental Guidelines for Sex Offender Registration and Notification*, 76 Fed. Reg. 1630 (Jan. 11, 2011). On the basis of the Attorney General's authority under 42 U.S.C. 16914(a)(7) to expand the range of required registration information, the supplemental guidelines require sex offenders "to inform their residence jurisdictions of intended travel outside of the United States at least 21 days in advance of such trav-

el," without regard to whether that travel would result in a change of residence. 76 Fed. Reg. at 1637.

2. In 2003, petitioner was convicted of traveling in interstate commerce with intent to have sex with a minor, in violation of 18 U.S.C. 2423(b), and sentenced to a 120-month term of imprisonment. J.A. 118. That conviction preceded SORNA's enactment, but petitioner was later subjected to SORNA's registration requirements by the Attorney General's rule. See 28 C.F.R. 72.3.

In December 2011, petitioner was released from federal prison and, while on federal supervision in the District of Kansas, he registered as a sex offender with the Leavenworth County Sheriff. J.A. 79. Petitioner complied with SORNA and Kansas law by registering as a sex offender in January, April (when he reported a change of address), July, and October 2012. *Ibid.* Each time petitioner registered, he reviewed and initialed a form on which he acknowledged that he was required to "register in person upon commencement, change, or termination of residence location * * * within three days of such commencement, change or termination"; and that he was required to report in person and give written notice at least 21 days before any "travel outside of the United States." J.A. 79-80.

On November 9, 2012, the landlord at petitioner's apartment complex in Leavenworth, Kansas, found in a drop-box keys to petitioner's apartment and a note indicating that he was moving out. Presentence Investigation Report (PSR) ¶ 16. Petitioner had abandoned the apartment that day, traveled to the airport in Kansas City, Missouri, and flown to the Philippines. J.A. 81. He then "established a new residence" at a hotel in Manila. *Ibid.*

After petitioner failed to report for sex-offender treatment, his probation officer determined that all of his telephone numbers were disconnected and that he had vacated his apartment. PSR ¶ 16. A warrant revoking petitioner's supervised release was issued, and further investigation identified email and chat communications indicating that he was in Manila, making arrangements to engage in sexual activities. PSR ¶¶ 17-18. On December 26, 2012, he was taken into custody at his hotel by Philippine law-enforcement officers, acting with the U.S. Department of State's Diplomatic Security Service. PSR ¶ 21. He was later escorted back to the United States. *Ibid.*

At no point before his arrest had petitioner updated his sex-offender registration or otherwise informed any state or federal law-enforcement authorities that he had terminated his Kansas residence or that he intended to and did travel to the Philippines and establish a new residence. J.A. 81.

3. In June 2013, a federal grand jury indicted petitioner on one count of knowingly failing to register and update a registration as required by SORNA, in violation of 18 U.S.C. 2250(a). J.A. 11-12. Before trial, petitioner moved to dismiss the indictment on the grounds that he did not violate SORNA while in the Philippines and that the Attorney General's power to specify the applicability of SORNA's registration requirements is inconsistent with the nondelegation doctrine. J.A. 13-19. After a hearing, J.A. 26-53, the district court denied the motion in a written order, J.A. 54-64. Petitioner entered a conditional guilty plea that allowed him to raise both issues on appeal. J.A. 79-80, 84.

4. a. The court of appeals affirmed. J.A. 117-133. As relevant here, the court held that petitioner violat-

ed SORNA when he left his residence in Kansas and moved to the Philippines without updating his sex-offender registration to reflect that he was no longer residing in Kansas. J.A. 125-126. The court relied on its previous decision in *United States* v. *Murphy*, 664 F.3d 798 (10th Cir. 2011), which also involved a registered sex offender who left his residence in the United States and moved to a foreign country. In *Murphy*, the court reasoned that when a sex offender abandons his current living place, that constitutes a "change" of residence that triggers the obligation under Section 16913(c) to update a sex-offender registration, even if the offender has not yet established a new residence. *Id.* at 801-803. *Murphy* further concluded that, when an offender leaves his residence in a State and also leaves the State altogether, that State remains a "jurisdiction involved" under SORNA. *Id.* at 803. And it concluded that the obligation to update the registration to reflect the abandoned residence does not disappear simply because the sex offender relocates to a non-SORNA jurisdiction (such as a foreign country) before the three-day deadline for updating his registration passes. *Ibid.* The decision below reiterated those three propositions from *Murphy*, J.A. 123-124, and rejected petitioner's contention that the decision in *Murphy* is inconsistent with this Court's earlier decision in *Carr*, J.A. 125.

The court of appeals also rejected petitioner's constitutional argument, concluding that Congress had not violated the nondelegation doctrine by authorizing the Attorney General to specify SORNA's applicability to previously convicted sex offenders. J.A. 128-131.

Judge McKay concurred. J.A. 132-133. He agreed that the panel's statutory-construction holding was

controlled by *Murphy*, though he expressed disagreement with *Murphy* itself. *Ibid.*

b. The court of appeals denied rehearing en banc. J.A. 134-135. In an opinion dissenting from the denial, Judge Lucero noted that, on the statutory question, he continued to agree with his earlier dissent in *Murphy*. J.A. 135. Judge Gorsuch also dissented from the denial of rehearing, focusing principally on the nondelegation question and concluding that SORNA's delegation to the Attorney General was impermissible. J.A. 137-158.

5. Petitioner filed a petition for a writ of certiorari in this Court, presenting the statutory question and the nondelegation question. Pet. i. The Court granted the petition, limited to the statutory question. J.A. 159.

SUMMARY OF ARGUMENT

A registered sex offender violates his obligation under the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. 16901 *et seq.*, to keep his registration current when he abandons his U.S. residence and relocates to a foreign country without reporting that change of residence.

A. SORNA requires sex offenders to keep their registration information "current" by providing notice of each "change of * * * residence, employment, or student status." 42 U.S.C. 16913(a) and (c). When a sex offender abandons a registered address, that constitutes a "change" in his residence, and it must be reported even if he has not decided upon or arrived at a new address, just as he would be required to report that he had quit his job or graduated from school. The offender may satisfy that reporting requirement by providing information about the change to "at least 1

jurisdiction involved" within three business days. 42 U.S.C. 16913(c).

In many circumstances, an offender can provide timely notice that he left his prior residence and arrived at a new one by informing his new residence jurisdiction about both changes of residence at once. Petitioner, however, contends that SORNA permits a sex offender to provide only current (rather than past or future) information about where he resides and further permits him to provide such information only to a jurisdiction in which he is presently residing (or working or attending school). But both of his underlying premises—about what information a sex offender may provide and about which jurisdictions may receive it—are wrong. SORNA expressly contemplates that an offender may furnish registration information about a future address, because Congress has defined the "[i]nformation required in registration" to include "[t]he address of each residence at which the sex offender resides *or will reside*." 42 U.S.C. 16914(a)(3) (emphasis added). And a jurisdiction where an offender has just ceased to reside still remains a "jurisdiction involved pursuant to [Section 16913(a)]" as long as the offender continues to appear in that jurisdiction's registry as one of its residents. That means he may still update his registration information there and must do so if he will not otherwise be able to satisfy the three-business-day deadline from somewhere else. 42 U.S.C. 16913(c).

B. The government's reading of Section 16913 furthers SORNA's key purpose, because requiring a sex offender to update his address of record before leaving the country enables States to maintain accurate registries with up-to-date information about where sex

offenders live, work, and attend school. Accurate, current information is important even with respect to sex offenders who have moved abroad, because it allows law-enforcement authorities to rule out potential suspects of sex crimes, encourages confidence in the integrity of sex-offender registries, and minimizes the need to expend time and resources locating offenders who are no longer at their residences of record. An offender who has absconded may pose no direct continuing threat to his old neighborhood, but community members should not make decisions about where to live or allow their children to go on the basis of obsolete information creating a misimpression that absent offenders still reside in the area. The United States' independent knowledge of which persons happen to be leaving the country is not an adequate substitute for proper notification because not everyone who travels overseas is changing his residence.

C. The government's reading of Section 16913 is consistent with the statutory history of Congress's efforts to strengthen the Nation's sex-offender-registration systems. Although SORNA does not require, as the earlier Wetterling Act did, that sex offenders must always give advance notice to a jurisdiction they are leaving, it still creates a system that ensures that the departure jurisdiction will learn about such a change either from the offender himself or from another jurisdiction. Yet, petitioner's reading would prevent the departure jurisdiction from learning that its residents have left, which would make its registry *less accurate* than it was before SORNA. The existence of state-law departure-notification requirements does not obviate the need for a similar federal requirement in appropriate circumstances, since SORNA

seeks to create substantial overlap between state and federal registration requirements and their criminal-enforcement mechanisms. And pending proposals to expand SORNA to require sex offenders to report all intended international travel provide no support for petitioner's reading of SORNA. While such a requirement could capture information about sex offenders like petitioner, it would reach far beyond the subset of international trips that involve a change of residence and would address different concerns.

D. Finally, the rule of lenity does not apply in this case because no grievous ambiguity exists once the Court has construed the text of Section 16913 in light of SORNA's context, structure, and purpose. Congress did not intend for SORNA's comprehensive sex-offender-registration system to contain inaccurate and outdated address information whenever a registered sex offender moved to a foreign country.

ARGUMENT

A REGISTERED SEX OFFENDER VIOLATES HIS OBLIGATION UNDER SORNA TO KEEP HIS REGISTRATION CURRENT WHEN HE ABANDONS HIS U.S. RESIDENCE AND RELOCATES TO A FOREIGN COUNTRY WITHOUT REPORTING THAT CHANGE OF RESIDENCE

Petitioner contends (Br. 22-59) that, as a matter of statutory construction, a sex offender who fails to alert domestic authorities that he is abandoning his residence in the United States and moving to a foreign country cannot be prosecuted under 18 U.S.C. 2250(a) for knowingly failing to update his registration as required by the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. 16901 *et seq.* That argument is not supported by SORNA's statutory text, structure, and context. And it would vitiate SORNA's

key purpose of ensuring that the comprehensive national sex-offender-registration system contains current, rather than outdated, information about where sex offenders reside. A sex offender who abandons his U.S. residence of record must report that change of residence to his registration jurisdiction in a timely fashion, even if he intends to (and later does) establish a new residence in a location where he will not have continuing registration obligations.

A. SORNA's Text, Structure, And Context Require A Registered Sex Offender To Inform At Least One Registration Jurisdiction When He Abandons His Residence Of Record For One In A Foreign Country

Petitioner contends (Br. 23-42) that six overlapping aspects of SORNA's text indicate that a sex offender who leaves his residence of record is not required to report that departure as a change in his registration information until he arrives in another location where he has continuing registration obligations under SORNA. He focuses on the statute's use of present-tense verbs when defining where a sex offender resides, where he must register, and where he may update his registration, and on its references to "current" information. But petitioner's reading of the statute founders on "the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Utility Air Regulatory Grp.* v. *Environmental Prot. Agency*, 134 S. Ct. 2427, 2441 (2014) (citation and internal quotation marks omitted). In context, the applicable statutory provisions show that when a sex offender abandons his U.S. residence, he triggers an obligation to update his registration information regardless of where he moves or when he

gets there. The statute further contemplates that, when necessary, an offender may indeed provide information about what his residence will be (or not be) in the future, in order to keep his registration information "current." 42 U.S.C. 16913(a).

1. SORNA requires sex offenders to keep their registration information "current" by providing notice of each "change" of residence

SORNA's "general" registration obligation is contained in 42 U.S.C. 16913(a), which provides in part that "[a] sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." A subsequent subsection further addresses how a sex offender may keep his registration current, providing that "[a] sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry." 42 U.S.C. 16913(c).

SORNA does not define the term "residence," but it defines "resides [*sic*]" as "the location of [an] individual's home or other place where the individual habitually lives." 42 U.S.C. 16911(13). In specifying what information is "required in registration," it includes "[t]he address of each residence at which the sex offender resides or will reside." 42 U.S.C. 16914(a)(3).

A registered sex offender is thus required by Section 16913(a) and (c) to keep his registration information "current" by providing timely notice of each "change" of residence he experiences.

2. A sex offender's abandonment of a registered address constitutes a "change" in residence even before he has decided upon or arrived at a new address

A sex offender who abandons his established residence experiences a "change" that must be timely reported to keep his registration current. That follows from the plain meaning of the noun "change." See *Webster's Third New International Dictionary* 374 (2002) (def. 1: "the fact of becoming different"; def. 2 a: "an instance of making or becoming different in some particular"); 3 *Oxford English Dictionary* 15 (2d ed. 1989) (def. 4.a: "alteration in the state or quality of anything; the fact of becoming other than it was"); see also *United States* v. *Van Buren*, 599 F.3d 170, 173-174 (2d Cir.) (approving jury instruction providing: "A change in residence does not require that you find that the defendant has established a new residence. Rather, it's enough for you to find that the defendant's home or other place where he habitually lives is no longer the same as the one listed in the registry."), cert. denied, 562 U.S. 971 (2010); *United States* v. *Voice*, 622 F.3d 870, 875 n.2 (8th Cir. 2010) (agreeing with *Van Buren*'s "analysis of the statute's language and apparent intent"), cert. denied, 562 U.S. 1206 (2011).

Any contention that a reportable "change" in registration does not occur until a former residence has been replaced by a new one is refuted by the statute's precisely parallel treatment of "each change of * * * residence, employment, or student status." 42 U.S.C. 16913(c). A sex offender who graduates or withdraws from college has unquestionably experienced a change in his student status, even if he has no plans for further study. Similarly, a sex offender who quits his job cannot simply wait until he begins working somewhere

else before having to report that he no longer works at the address listed in the registry as the "place where [he] is * * * an employee." 42 U.S.C. 16914(a)(4). The same is true of a sex offender who quits his residence and has yet to establish a new one.

In October 2012, petitioner reported to Kansas sex-offender-registration officials that his physical residence was a particular apartment in Leavenworth, Kansas. J.A. 80. On November 9, 2012, he "abandoned" that residence, J.A. 81, by dropping off his keys for the landlord with a note that he was moving out, PSR ¶ 16. At that point—even before he went to the airport, or flew to the Philippines, or "established [his] new residence" at a Manila hotel, J.A. 81—petitioner experienced a "change of * * * residence" that triggered his obligation to keep his registration current under Section 16913(a) and (c). That change was an event that he was required to report to satisfy his statutory obligation.

3. SORNA expressly contemplates the furnishing of registration information about a future address

Petitioner's textual argument that he was not required to report that he had abandoned his Kansas residence begins with his focus on the requirement for an offender to keep his registration current in the jurisdiction where he "resides" (42 U.S.C. 16913(a))—a requirement that petitioner maintains does not apply to a jurisdiction where the offender "formerly resided." Pet. Br. 23-24. That verb-tense argument is wrong (see pp. 24-25, *infra*), but most saliently here, so is his ultimate and essential submission that SORNA does not *permit* an offender to provide information about a future, as opposed to a current, residence. Pet. Br. 37-39. As he summarizes: "At no point would

an offender report 'past' or 'future' information when '[k]eeping the registration current' for purposes of § 16913(c)." Pet. Br. 38. But the implication that petitioner draws from the statute is refuted by SORNA's text, which does not preclude an offender from providing notice to the jurisdiction in which he currently resides that his residence will be changing.

Petitioner sees (Br. 33-35) the three-business-day grace period in Section 16913(c) as evidence that Congress permits notification only "after" a change of residence. That misreads the text.[2] The provision specifies that notification must occur "*not later* than 3 business days after each change of * * * residence," 42 U.S.C. 16913(c) (emphasis added), thus marking only the *latest* time at which the information can be timely given. As petitioner notes (Br. 33), the grace period "allows a sex offender some leeway in keeping his registration current." But it does not preclude giving notice before the end of the period, or even before the triggering change itself has occurred. What the deadline does preclude is never informing at least one jurisdiction that the registered address has been, or will be, changed. It is a grace period, not an escape clause for a sex offender who has not arrived at a new registrable address during that period. See *United States* v. *Murphy*, 664 F.3d 798, 803 (10th Cir. 2011) ("Needless to say, a legal obligation under federal law

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[2] In relevant part, 42 U.S.C. 16913(c) reads as follows:

> A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry.

does not expire simply because one has managed to leave the country before the date on which noncompliance is punishable.").

In claiming that SORNA is indifferent to the abandonment of a residence before a new registrable address is established, petitioner focuses (Br. 37-39) on Section 16913's references to "current" (rather than future) information. But his reading is inconsistent with the background rule supplied by the Dictionary Act, see 1 U.S.C. 1 ("words used in the present tense include the future as well as the present"), and with the text of SORNA itself. The next section, entitled "Information required in registration," delineates what information a sex offender must provide "for inclusion in the sex offender registry." 42 U.S.C. 16914(a). Although the Attorney General may augment the list, 42 U.S.C. 16914(a)(7), Congress expressly requires "[t]he address of each residence at which the sex offender resides *or will reside*." 42 U.S.C. 16914(a)(3) (emphasis added). It similarly requires "[t]he name and address of any place where the sex offender is * * * or will be an employee" or "is * * * or will be a student." 42 U.S.C. 16914(a)(4)-(5).

Petitioner reads (Br. 38) Section 16914(a)(3)'s reference to addresses where the sex offender "will reside" as pertaining only to an offender who is incarcerated at the time of his initial registration and who provides information about where he intends to reside after release. Yet, petitioner identifies no statutory text that distinguishes, in that fashion, an initial registration from an updated registration. The statute provides that initial registration shall occur in each jurisdiction in which the offender resides, works, or attends school as well as in the jurisdiction in which he

was convicted, if the latter is "different from the jurisdiction of residence." 42 U.S.C. 16913(a). It specifies that initial registration must occur before the offender completes a term of imprisonment associated with the offense that requires registration (or within three business days of sentencing, if there is no term of imprisonment). 42 U.S.C. 16913(b). And it authorizes the Attorney General to prescribe rules for the initial registration of sex offenders with pre-SORNA convictions. 42 U.S.C. 16913(d). But, in addressing initial registration, SORNA does not use different verb tenses or in any other way suggest that initial registration alone accounts for Sections 16914(a)(3)'s reference to information about the location where a sex offender "will reside."

Lacking support in the statute itself, petitioner suggests that the Attorney General's 2008 guidelines support the proposition that "initial registration prior to release from imprisonment" is "[t]he only time in which § 16913 expressly requires a sex offender to provide future information." Pet. Br. 38 (citing 73 Fed. Reg. at 38,055). But the guidelines language on which petitioner relies does not say that pre-release registration is the "only" instance in which future information may be required. To the contrary, the sentence introduces that scenario with the phrase "for example." 73 Fed. Reg. at 38,055. And elsewhere, the guidelines specify, when addressing the obligation to keep registration current, that a sex offender must be required "to inform the jurisdiction if [he] intends to commence residence, employment, or school attendance in another jurisdiction" or if he "intends to commence residence, employment, or school attendance outside of the United States." *Id.* at 38,065, 38,067.

Accordingly, Section 16913(a)'s reference to "current" information does not, as petitioner contends (Br. 38), preclude an offender from providing *current* information about where he *will* reside. And that future orientation necessarily means that he may provide current information about where he will no longer reside. The statute does not, as petitioner would have it, require that the registry must contain outdated, incorrect information about a sex offender's residence when the abandonment of his residence means that his "current" information has changed.

4. A sex offender who abandons his residence of record and does not establish a new residence within a SORNA jurisdiction during the grace period must timely inform his departure jurisdiction of the change of address

a. In the mine run of cases—those involving a registered sex offender who moves promptly to another known address in a jurisdiction where SORNA requires continued registration—Section 16913 allows a sex offender to provide notification of two changes of address at once. His residence information will change when he leaves the place where he has been residing, and it will change again when he arrives at his new residence. He must report both of those changes in a timely fashion, but he will not violate that obligation unless three business days elapse without any report. If the new residence is established by the end of the third business day after the former residence is abandoned, he may simultaneously report his new residence as the current residence and report that he is no longer residing at the former residence. He may do that in any one of the jurisdictions where he is then residing, working, or attending school. 42 U.S.C.

16913(a) and (c). That jurisdiction will then "immediately" supply the new registration information to "each jurisdiction from or to which a change of residence, employment, or student status occurs," 42 U.S.C. 16921(b)(3), thus ensuring that the departure jurisdiction receives prompt notification of the departure.

b. If, however, the sex offender has not already established his new residence in a new SORNA jurisdiction by the end of the third business day after abandoning his former residence (and he is not otherwise working or studying in any SORNA jurisdiction), then he will not be able to give timely notice of his first change in residence—the abandonment of his old residence—by waiting until he arrives at his new residence to report both changes. But that poses a potential problem: "If such changes [are] not reported, the affected jurisdictions' registries [will] not be kept current, but rather [will] contain outdated information showing sex offenders to be residing * * * in places where they no longer are." 73 Fed. Reg. at 38,066.

Petitioner emphasizes (Br. 39) that Congress has adopted a "common sense approach," under which "a sex offender who changes his residence has three business days to report that change to the jurisdiction where he [newly] resides, not to his former jurisdiction." But petitioner has no sound answer for handling a period of what he calls "residency limbo" (Br. 29) that lasts for more than three business days. On the one hand, an offender's obligations to "keep the registration current" (42 U.S.C. 16913(a)) and to inform "at least 1 jurisdiction * * * of all changes in the information required" (42 U.S.C. 16913(c)) cannot simply disappear whenever such a temporal gap occurs or can be arranged by the offender. On the other hand, read-

ing SORNA to *require* every sex offender to establish a new residence within three business days would transform SORNA's purported grace period into a remarkably stringent requirement with no antecedents in prior laws—and one at odds with the Attorney General's recognition that "a transient sex offender may be leaving the jurisdiction in which he is registered as a resident, but may be unable to say where he will be living thereafter," just as he may be unable to say where he will next be employed or attend school, 73 Fed. Reg. at 38,066. Moreover, petitioner's inability to explain how a sex offender who takes more than three business days to move can still comply with SORNA's registration requirements arguably extends beyond the context of international relocations, which would only magnify its anomalous and problematic consequences.[3]

c. SORNA does not require petitioner's counter-intuitive and anomalous result. When a sex offender will not be able to establish a new residence from which he may report both changes of registration

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[3] Although the question presented is expressly limited to the context of a sex offender's move to a foreign country, Pet. Br. i, many of petitioner's contentions—including the bulk of his argument about the statutory text, *id.* at 23-39—are not obviously constrained to international relocations. Only one of the "six interrelated [textual] reasons" (*id.* at 23) that petitioner identifies in support of his construction is specific to the international context, see *id.* at 40 ("A foreign country is not a SORNA jurisdiction."). His statutory context and purpose arguments depend in part on the international context, see *id.* at 42 ("SORNA does not expressly regulate offenders who leave the United States."); *id.* at 47 (notification about a "move[] to a foreign country would not meaningfully advance SORNA's purposes"), but his statutory history argument generally does not, *id.* at 52-59.

information within three business days, he may still satisfy his Section 16913(a) obligation to keep his registration "current" by providing notice of the first change—the abandonment of his former residence—in the jurisdiction he is or will be leaving. Reporting the imminent change of residence on the day before, or the morning of, the move would unquestionably satisfy petitioner's concern (Br. 23-24, 25-26, 31-32, 33, 40-41) about a sex offender's being able to report only in the jurisdiction where he presently "resides."

In any event, petitioner erroneously emphasizes the present tense of the verb "resides." In petitioner's view (Br. 23-24), a sex offender may update his registration only in a jurisdiction where he presently "resides" because Section 16913(c) says he must give his new information to "at least 1 jurisdiction involved pursuant to subsection (a)" and, in turn, subsection (a) requires an offender to register "where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. 16913(a) and (c). But the simple interpolation of the phrase "where the offender resides" into subsection (c) does not accurately capture the meaning of Congress's cross reference. A jurisdiction *first* becomes involved with an offender's registration when he begins to reside there (or initially registers as a resident there). But once the offender is registered there, with an obligation to "keep the registration current," 42 U.S.C. 16913(a), that jurisdiction necessarily *remains* "involved pursuant to subsection (a)," because the offender continues to appear on its registry as a current resident. Indeed, Congress recognized that jurisdiction's continuing involvement by providing that, regardless of which jurisdiction actually receives updated registration information pursuant

to Section 16913(c), that information will be shared with "each jurisdiction *from* or to which a change of residence * * * occurs," 42 U.S.C. 16921(b)(3) (emphasis added).

Kansas therefore did not cease to be a "jurisdiction involved pursuant to subsection (a)" in the precise moment when petitioner turned out the lights, locked the door, and dropped off his apartment keys, even if that was the moment he ceased to be a "resident" of Kansas. Petitioner could have satisfied his obligation to provide notice of his change of residence to "at least 1 jurisdiction involved" by updating his information with Kansas officials on his way out of town (or, for that matter, by staying in the area for an extra day after moving out of his apartment). It is true that, by going to the airport, he was unable to take advantage of the entire grace period provided by Section 16913(c). Cf. Pet. Br. 32. But he could have kept his registration current by giving notice to Kansas.

d. Permitting sex offenders to give advance or concurrent notice in their departure jurisdiction whenever delayed notice from a new jurisdiction could not satisfy the three-business-day deadline is a manageable and reasonable way of fulfilling the need to keep registration information current. As petitioner acknowledges (Br. 58), some States, including Kansas, continue to require *every* departing sex offender to give in-person notice of his departure to that jurisdiction even in circumstances where he could have complied with SORNA itself by simultaneously informing only the jurisdiction of his new residence about both the departure and the arrival.[4]

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[4] See Kan. Stat. Ann. § 22-4905(g) (Supp. 2013) (requiring an offender to "register in person upon any commencement, change

In short, SORNA specifically contemplates the possibility that a sex offender will provide information about where he "will reside" (42 U.S.C. 16914(a)(3)) and that necessarily means that he can inform the departure jurisdiction that he "will" no longer reside there—just as the Attorney General's 2008 guidelines prescribe for moves in both the domestic and international contexts. See p. 6, *supra*. And SORNA's provision for notifying a "jurisdiction involved" (42 U.S.C. 16913(c)) can be satisfied after an offender has changed his residence and no longer resides in that jurisdiction, so long as he provides that notice within three business days. Accordingly, when petitioner abandoned his Kansas residence, SORNA's grace-period provision neither prevented him from complying with the requirement to update his registration to reflect that change nor justified leaving Kansas in the dark about the impending and actual change in his residence, even if his new address was unknown or was going to be in a location (such as the Philippines) where continued reporting would not be required.

5. The foregoing construction is consistent with Carr, *with the Attorney General's guidelines, and with Section 16928*

a. Petitioner suggests (Br. 25) that the foregoing construction is inconsistent with *Carr* v. *United States*, 560 U.S. 438 (2010), which "involved the interpretation of present-tense verbs within" 18 U.S.C. 2250, o criminal-enforcement provision. In his view, a similar focus on the "'undeviating use of the present tense'" in Sec-

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or termination of residence location * * * within three business days of such commencement, change or termination, to the registering law enforcement agency or agencies where last registered").

tion 16913(a) and (c) indicates that those provisions have a "'prospective orientation'" and do not require a sex offender "to register and keep the registration current in the jurisdiction" where he no longer resides. Pet. Br. 24-25 (quoting *Carr*, 560 U.S. at 449). That reliance on tenses and *Carr* does not assist him.

Carr held that failing to register as a sex offender in accordance with SORNA's requirements is not a federal crime under Section 2250(a) when a state sex offender's only travel in interstate commerce occurred before SORNA became effective and imposed a registration obligation on him. 560 U.S. at 442. In doing so, the Court accepted the government's contention that all three elements of a Section 2250(a)(2)(B) violation—a requirement to register under SORNA, travel in interstate or foreign commerce, and a knowing failure to register or update a registration—must occur "in sequence." *Id.* at 446.

As a sex offender who was required to register by virtue of a federal conviction, petitioner's offense conduct here did not even implicate the travel element. See 18 U.S.C. 2250(a)(2)(A); *Carr*, 560 U.S. at 452 ("[I]t is entirely reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders—persons who typically would have spent time under federal criminal supervision."); see also *United States* v. *Kebodeaux*, 133 S. Ct. 2496, 2504 (2013). Yet, even if petitioner had been a state sex offender, the circumstances of his conviction would satisfy *Carr*'s sequencing requirement. His obligation to update his registration was triggered when he changed his address by abandoning his Kansas residence (and before he traveled outside of Kan-

sas). Petitioner could have complied with SORNA by notifying Kansas of that change *before* he traveled in interstate or foreign commerce to move from his former residence. But his violation of the obligation to keep his registration current did not become complete until the grace period expired without any update to Kansas officials, which happened only after he had traveled. See *United States* v. *Lewis*, 768 F.3d 1086, 1091 n.4 (10th Cir. 2014) ("[A] conditional obligation [to update a registration] is triggered when the offender abandons his residence, not when he crosses state lines. When the offender thereafter completes steps two (crossing state lines) and three (failing to register) sequentially, he is subject to prosecution[.]"), cert. denied, 135 S. Ct. 1513 (2015).[5]

b. The government's construction is also consistent with the passages petitioner discusses from the Attorney General's 2008 guidelines about SORNA's implementation.

First, petitioner errs in concluding (Br. 58) that the Attorney General's guidelines characterize SORNA as never requiring notification to the departure jurisdiction. The passage he cites says SORNA jurisdictions are allowed to impose "more stringent" reporting standards than SORNA itself and gives the example of

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[5] Petitioner also relies (Br. 24-25) on *Carr*'s refusal to read Section 2250's present-tense reference to someone who "'resides i[n] Indian country'" as including "persons who once resided in Indian country but who left before SORNA's enactment." 560 U.S. at 449 (quoting 18 U.S.C. 2250(a)(2)(B)). This case, however, turns on where petitioner was residing when he abandoned his Kansas residence in November 2012, years after SORNA was enacted and petitioner was made subject to its requirements that he "register, and keep the registration current, in each jurisdiction where [he] resides." 42 U.S.C. 16913(a).

"requiring that changes of residence be reported before the sex offender moves, rather than within three business days following the move." 73 Fed. Reg. at 38,046. It would, of course, be more stringent than SORNA to require such advance reporting *in all circumstances*, including those in which Section 16913(c) can be satisfied by simultaneously reporting both a departure from one jurisdiction and an arrival elsewhere before the grace period expires. But in the subset of cases where SORNA's requirement to report "all changes in the information required" (42 U.S.C. 16913(c)) cannot be satisfied in that fashion, requiring that the first change be reported in the departure jurisdiction is not more stringent than SORNA, but coterminous with the construction articulated above.

Second, petitioner also misreads (Br. 46 n.14, 58-59) the Attorney General's explanation of the statutory foundation for a sex offender's obligation to report that he is abandoning his U.S. residence. In petitioner's view, the Attorney General deemed such a report to be "supplemental" information not required by Section 16913(c) and based the reporting obligation on 42 U.S.C. 16928, which pertains to sex offenders who enter the United States. Although the Attorney General did observe that information about offenders' departures from the United States would help to implement Section 16928, he also explained that a change in residence to a foreign country "implicates the requirement of [Section 16913(a)] that sex offenders keep the registration current in all jurisdictions in which they reside, work, or attend school." 73 Fed. Reg. at 38,066. The reference, several paragraphs later, to Section 16913(c)'s in-person reporting requirement as applying to changes "between jurisdic-

tions," *id.* at 38,067, did not make information about an international change of address supplemental, because it was still premised on the requirement that offenders comply with the SORNA-imposed obligation to keep their registration current by providing, as the Attorney General had specified, notice to a registration jurisdiction of an "inten[tion] to commence residence * * * outside of the United States," *ibid.*

c. Petitioner also contends (Br. 42-46) that Section 16928—which requires a system for identifying "persons *entering* the United States who are required to register under [SORNA]," 42 U.S.C. 16928 (emphasis added)—implicitly excuses those who *leave* the United States from any registration obligation. But that does not follow. The question here is not whether petitioner was leaving the country, but whether he was changing his address of record. That does not require universal coverage of all departures from the United States, and Congress would have understood that Section 16913 already required a registered offender to provide notice when he abandoned (and therefore changed) his U.S. residence in the process of going abroad.[6]

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[6] Petitioner compares (Br. 43, 45-46) the entry provision to 18 U.S.C. 2250(a)(2)(B), which refers more capaciously to an offender who "travels in interstate or foreign commerce, or enters or leaves * * * Indian country." But that shows only that Section 2250 is broader, in that regard, than Section 16928. It does not imply that other provisions of SORNA are inapplicable to conduct that happens to involve leaving the United States but also implicates the requirement to keep registration information "current."

B. Requiring A Sex Offender To Give Notice That He Will No Longer Reside At His Address Of Record Furthers SORNA's Purposes

The government's reading of SORNA's registration requirements not only comports with the statute's text, structure, and context. It also furthers SORNA's key purpose of ensuring that sex-offender registries provide up-to-date information to law enforcement and the public about where sex offenders live, work, and attend school. By contrast, petitioner's construction signally undermines that purpose by allowing a sex offender to compromise the integrity of the registry itself by terminating his U.S. residence without providing any indication that critical information about him has ceased to be current.

1. As discussed above (see pp. 2-3, *supra*), in the dozen years before SORNA, Congress enacted multiple laws intended to encourage effective sex-offender-registration and community-notification programs. By 2006, however, an estimated 100,000 out of 500,000 sex offenders in the United States were "unregistered and their locations unknown to the public and law enforcement." 152 Cong. Rec. 15,713 (2006) (statement of Rep. Sensenbrenner). Those "missing" sex offenders were considered "[t]he most significant enforcement issue in the sex offender program." *House Report* 26. And the reason for that problem was clear: The missing offenders had fallen through the cracks of "a patchwork of federal and 50 individual state registration systems." *Reynolds* v. *United States*, 132 S. Ct. 975, 978 (2012).

SORNA was accordingly designed to "establish[] a comprehensive national system for the registration of [sex] offenders." 42 U.S.C. 16901. As the Court has

acknowledged, the registration provisions "stand at the center of Congress' effort to account for missing sex offenders." *Carr*, 560 U.S. at 456. The "most basic character" of a sex-offender registry is to provide a "system[] for tracking sex offenders following their release into the community." 73 Fed. Reg. at 38,044. The system thus requires "both state and federal sex offenders to register with relevant jurisdictions (and to keep registration information current)," and it "creat[es] federal criminal sanctions applicable to those who violate the Act's registration requirements." *Reynolds*, 132 S. Ct. at 978.

Excusing offenders from the need to provide any notification whatsoever when they leave their address of record—simply because they are moving to a foreign country rather than someplace within a SORNA jurisdiction—would undermine Congress's command that offenders must register *and* keep their registrations "current." 42 U.S.C. 16913(a) and (c). And, allowing outdated, and therefore misleading, information to persist in the registry would defeat the goal of "ensur[ing] that law enforcement agencies and America's communities know where sex offenders live and work." 152 Cong. Rec. at 15,713. It would recreate, albeit on a smaller scale, the very problem of "missing" sex offenders that SORNA sought to fix. *House Report* 26.

Put simply: "Without accurate registration information, SORNA would be ineffective." *Van Buren*, 599 F.3d at 175. And the need for accuracy extends not only to the jurisdictions where an offender lives, works, or studies, but also to the ones where he no longer lives, works, or studies. That is reflected in SORNA's express requirement that, regardless of which jurisdiction acquires updated registration in-

formation from a sex offender, that information is to be shared "immediately" with "each jurisdiction *from or to which* a change of residence, employment, or student status occurs." 42 U.S.C. 16921(b)(3) (emphasis added).[7]

2. Petitioner contends (Br. 47-51) that SORNA is intended merely to protect children in the United States, not those in foreign countries, and therefore no reason exists to track sex offenders while they are abroad. But petitioner overlooks the many ways in which inaccurate registration information frustrates indisputably legitimate (and wholly domestic) purposes of SORNA. For instance, when "a sexually violent crime occurs or a child is molested," registration information can be used by law-enforcement authorities to identify sex offenders who may have been in the area. 73 Fed. Reg. at 38,044. Yet, a registry that contains obsolete information indicating falsely that certain sex offenders still live in the area could divert

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[7] Petitioner parenthetically quotes (Br. 33) part of *Reynolds*'s observation that the government had "overstate[d] the need for *instantaneous* registration of pre-Act offenders." 132 S. Ct. at 983. But the Court was not referring to the need for information about already-registered sex offenders to be updated in a timely fashion. It was instead discussing the transitional question of how 100,000 "missing" sex offenders with pre-SORNA convictions would be brought into the comprehensive new registration system. *Id.* at 982-983. For that purpose, the Court concluded that the 217-day period between SORNA's enactment and the Attorney General's interim rule had not been an intolerably "long" delay. *Id.* at 983. The Court had, however, already made clear that SORNA's applicability to pre-SORNA offenders was a proposition separate from the requirement that an already-registered "sex offender must update a registration within three business days of any change of 'name, residence, employment, or student status.'" *Id.* at 981 (quoting 42 U.S.C. 16913(c)).

scarce resources during investigations and, over time, cause law enforcement and the public to discount the value of the registry's information. Even in the absence of a particular incident, when an offender has appeared to verify his registration information on an annual, semi-annual, or quarterly basis (see 42 U.S.C. 16916) but then fails to appear without explanation, the jurisdiction will have to dedicate time and resources to determining his whereabouts, which may include calling for assistance from the United States Marshals Service. See 42 U.S.C. 16922, 16941(a); 73 Fed. Reg. at 38,069. Similarly, SORNA's community-notification purposes suffer when registries contain inaccurate information about sex offenders' old residential addresses. An offender who has absconded may pose no direct continuing threat to his old neighborhood, but community members should not make decisions about where to live or send their children—either for school or for an afternoon playdate—on the basis of obsolete information creating a misimpression that absent offenders still reside in the area.

Other important purposes, apart from avoiding inaccuracies in domestic registry information, are also served when the government knows that a sex offender is residing outside the country. Such knowledge may, for instance, help deter or identify violations of 18 U.S.C. 2423(c), which makes it a crime for a U.S. citizen or lawful permanent resident to travel in foreign commerce or reside in a foreign country and engage in illicit sexual conduct. Moreover, as the Attorney General has explained, tracking sex offenders who leave the United States to reside in foreign countries helps implement SORNA's requirement that the Departments of Justice, State, and Homeland Security

establish and maintain a system for identifying "persons entering the United States who are required to register under [SORNA]." 42 U.S.C. 16928; see 73 Fed. Reg. at 38,066-38,067.

3. Petitioner further suggests (Br. 50) that a sex offender need not notify authorities that he is abandoning his U.S. address because the United States is already independently "aware when a registered sex offender" uses his passport to leave the country. As an initial matter, this theory improperly shifts the responsibility for updating registration information from the sex offender to the United States, which is inconsistent with Section 16913. The theory also assumes, perhaps optimistically, that sex offenders will reliably report their passport information (something that is required by the Attorney General's guidelines as additional information to be reported, 73 Fed. Reg. at 38,056); that they will use those passports when traveling; and that they will be *sua sponte* tracked by federal officials who, under the Attorney General's 2011 supplemental guidelines, are generally supposed to receive advance notification from sex offenders and registration jurisdictions that a sex offender will be engaging in such travel, 76 Fed. Reg. at 1637.

In any event, petitioner's passport-tracking solution is deficient for an even more fundamental reason: It conflates knowledge that a sex offender happens to be traveling outside the country with knowledge that he is abandoning the U.S. residence reflected in the sex-offender registry. If an offender is actually moving abroad, then his old address should not be included in the registry as current information. But the same is not true if he will be returning in a day, a week, or a month. See Pet. Br. 45 n.13 (recognizing that tracking

the international travel of an offender who still resides in the United States "is different from tracking an offender who leaves the United States for good"). The government should not bear the onus of continually evaluating, as the sex offender's international sojourn lengthens, whether his address of record should be retained on the rolls as his "current" registration information. The offender himself should simply give notice at the outset that he is moving.

For similar reasons, a sex offender who is traveling abroad is hardly, as petitioner posits (Br. 50-51), "analogous to a sex offender who has died." To be sure, when a sex offender dies, he will not be able to update his registration information. SORNA therefore "does not address the updating of registration information in such circumstances." 73 Fed. Reg. at 38,068. But state and local authorities typically learn fairly quickly when a resident has died and may easily determine whether he is a registered sex offender. And a deceased sex offender is unlike a traveling sex offender, who can, of course, be reasonably asked to disclose when his departure from the jurisdiction also happens to effect a change of residence.

Given the ease of protecting the sex-offender registry's integrity from corruption with obsolete information, it would indeed come as a "surprise" (Pet. Br. 51) if SORNA were construed as not requiring a sex offender to give notice when he moves to a foreign country. SORNA's purposes are far better served if a sex offender satisfies his obligation to keep his registration information current by giving notice that he is abandoning his U.S. residence, rather than requiring local, federal, and foreign authorities to expend considerable resources tracking him down. This case

illustrates the point: Between November 16, 2012 and January 17, 2013, the investigation of petitioner's own disappearance involved federal probation officers, a federal-court warrant, the State Department's Diplomatic Security Service, the Manila Police Department, the Philippine Bureau of Immigration, and the United States Marshals Service. See J.A. 55; PSR ¶¶ 16-18, 21. None of that would have been necessary if petitioner had taken the simple step of advising Kansas of his change of residence.

C. The Statutory History Does Not Support Petitioner's Reading Of Section 16913

Applying SORNA's registration requirements to a sex offender who terminates his U.S. residence in order to relocate internationally is also consistent with the history of Congress's efforts to strengthen sex-offender-registration systems.

1. As petitioner describes (Br. 52-53), between 1997 and 2009, the Wetterling Act provided that a registered sex offender

> who moves to another State[] shall report the change of address to the responsible agency in the State the person is leaving, and shall comply with any registration requirement in the new State of residence. The procedures of the State the person is leaving shall ensure that notice is provided promptly to an agency responsible for registration in the new State, if that State requires registration.

42 U.S.C. 14071(b)(5) (2006) (repealed 2009).

According to petitioner (Br. 53-54), that provision indicates that, when it enacted SORNA, Congress "knew how to draft a departure notification provision but chose not to." That inference has no relevance

here because SORNA uses an alternative framework that still results in notification. SORNA does not universally require advance notice of a change of residence to the departure jurisdiction, but it includes other provisions intended to ensure that such information will be provided, either directly or indirectly, to the departure jurisdiction. In particular, it requires that information about every change in residence be given to "at least 1 jurisdiction," 42 U.S.C. 16913(c), and it then requires that jurisdiction to share the updated information immediately with "[e]ach jurisdiction where the sex offender resides * * * and each jurisdiction *from or to which* a change of residence * * * occurs," 42 U.S.C. 16921(b)(3) (emphasis added).

SORNA thereby replaced a one-way flow of information (from the departure jurisdiction to the new one) with a system that allows information to flow in either direction. But, under either statute, the departure jurisdiction learns of an offender's change of residence. Congress did not intend for the departure jurisdiction to be left, as petitioner's reading would allow, without notice and with a registry *less accurate* than it was under the Wetterling Act. See *Kebodeaux*, 133 S. Ct. at 2505 ("SORNA's general changes were designed to make more uniform" the "patchwork" of registries that existed under the Wetterling Act and repair the "loopholes and deficiencies that had resulted in an estimated 100,000 sex offenders becoming missing or lost.") (citations and internal quotation marks omitted).

2. In a variation on his Wetterling Act argument, petitioner contends (Br. 58) that, because Kansas law requires a sex offender to provide notice that he has changed or terminated his residence, Section 16913

need not be read "to include a similar federal obligation when that obligation exists under state law." States may, of course, impose and enforce registration requirements that are stricter than SORNA's. But the existence of "similar" obligations under federal and state law is to be expected, not avoided, in this area. SORNA seeks to create substantial overlap between state and federal registration obligations and between state and federal criminal-enforcement mechanisms. With federal funds, it encourages States to conform their sex-offender registries to SORNA's minimum standards, 42 U.S.C. 16912, 16925, and to enforce a sex offender's violation of those standards with "a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with [SORNA's] requirements," 42 U.S.C. 16913(e). Yet SORNA also includes Section 2250, a new federal felony provision that similarly penalizes failures to comply with SORNA's requirements. See *Reynolds*, 132 S. Ct. at 978. Thus, Kansas's ability to establish and enforce its own departure-notification requirement does not cast doubt on the federal interest in enforcing parallel requirements under SORNA and Section 2250.

3. Finally, petitioner suggests (Br. 49 n.16, 59 n.20) that post-SORNA legislative efforts that would specifically address sex offenders' international travel indicate Congress's understanding that such travel is not already covered by SORNA. But those proposals—which have passed the House and the Senate, in different versions, during the current Congress, but have not been enacted into law—have not been directed at changes of residence that cause domestic registries to

become outdated.[8] Instead, they would require, as relevant here, notice of *all* travel outside the United States by sex offenders, which petitioner concedes (Br. 45 n.13) raises concerns different from those presented by changes of residence. Such proposals are analogous to the international-travel portions of the Attorney General's 2011 supplemental guidelines, which rested on his power to *expand* the range of required registration information. See 76 Fed. Reg. at 1637. Those travel-reporting requirements, like the pending legislative proposals, go beyond the requirement of Section 16913 (which the Attorney General previously recognized) that a sex offender keep his registration information current by giving notice that he "intends to commence residence * * * outside of the United States," 73 Fed. Reg. at 38,067.

D. The Rule Of Lenity Has No Application To This Case

Finally, petitioner invokes (Br. 59-62) the rule of lenity, but it has no application here. As the Court has "repeatedly emphasized," the rule "applies only if, after considering text, structure, history and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Abramski* v. *United States*, 134 S. Ct. 2259, 2272 n.10 (2014) (citation and internal quotation marks omitted); see *Robers* v. *United States*, 134 S. Ct. 1854, 1859 (2014) (similar); *United States* v. *Hayes*, 555 U.S. 415, 429 (2009) (rejecting

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[8] See, *e.g.*, *International Megan's Law to Prevent Demand for Child Sex Trafficking*, H.R. 515, 114th Cong. (2015); 161 Cong. Rec. H542-H544 (daily ed. Jan. 26, 2015) (version passed by House of Representatives); 161 Cong. Rec. S8831-S8834 (daily ed. Dec. 17, 2015) (amended version passed by Senate).

application of the rule of lenity after considering "text, context, purpose, and * * * drafting history").

For the reasons discussed above, SORNA's text is not ambiguous. But even assuming that it were ambiguous in isolation, any ambiguity would be resolved by the context, structure, and purposes discussed above. "[T]he 'grammatical possibility' of a defendant's interpretation does not command a resort to the rule of lenity if the interpretation proffered by the defendant reflects 'an implausible reading of the congressional purpose.'" *Abbott* v. *United States*, 562 U.S. 8, 28 n.9 (2010) (quoting *Caron* v. *United States*, 524 U.S. 308, 316 (1998)). Here, it is not plausible that Congress intended for SORNA's comprehensive sex-offender-registration system to contain inaccurate and outdated address information whenever a registered sex offender moved to a foreign country.

Nor was petitioner's underlying conduct sufficiently innocent or innocuous to raise the fair-warning concerns associated with the rule of lenity. See, *e.g.*, *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 703-704 (2005) (discussing the situation in which "the act underlying the conviction * * * is by itself innocuous" and "not inherently malign"); see also *Hayes*, 555 U.S. at 437 (Roberts, C.J., dissenting). Just weeks before petitioner left Kansas for the Philippines, he acknowledged in writing, for the fourth time that year, that he "must register in person upon commencement, change, or termination of residence location, employment status, school attendance or other information within three days of such commencement, change or termination." J.A. 79-80. The wrongfulness of his knowing failure to update his registration as required is incontestable.

The rule of lenity does not justify petitioner's unduly cramped reading of his obligation to keep his registration current by notifying at least one jurisdiction that he was abandoning his address of record.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 2016

APPENDIX

1. 18 U.S.C. 2250 provides in pertinent part:

Failure to register

(a) IN GENERAL.—Whoever—

(1) is required to register under the Sex Offender Registration and Notification Act;

(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

(b) AFFIRMATIVE DEFENSE.—In a prosecution for a violation under subsection (a), it is an affirmative defense that—

(1) uncontrollable circumstances prevented the individual from complying;

(2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and

(3) the individual complied as soon as such circumstances ceased to exist.

* * * * *

2. 42 U.S.C. 16901 provides in pertinent part:

Declaration of purpose

In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this chapter establishes a comprehensive national system for the registration of those offenders:

* * * * *

3. 42 U.S.C. 16911 provides in pertinent part:

Relevant definitions, including Amie Zyla expansion of sex offender definition and expanded inclusion of child predators

In this subchapter the following definitions apply:

(1) Sex offender

The term "sex offender" means an individual who was convicted of a sex offense.

* * * * *

(5) Amie Zyla expansion of sex offense definition

(A) Generally

Except as limited by subparagraph (B) or (C), the term "sex offense" means—

(i) a criminal offense that has an element involving a sexual act or sexual contact with another;

(ii) a criminal offense that is a specified offense against a minor;

(iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of title 18;

(iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or

(v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

(B) Foreign convictions

A foreign conviction is not a sex offense for the purposes of this subchapter if it was not obtained with sufficient safeguards for fundamental fairness and due process for the accused under guidelines or regulations established under section 16912 of this title.

(C) Offenses involving consensual sexual conduct

An offense involving consensual sexual conduct is not a sex offense for the purposes of this subchapter if the victim was an adult, unless the adult was under the custodial authority of the offender at the time of the offense, or if the vic-

tim was at least 13 years old and the offender was not more than 4 years older than the victim.

(6) Criminal offense

The term "criminal offense" means a State, local, tribal, foreign, or military offense (to the extent specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note)) or other criminal offense.

(7) Expansion of definition of "specified offense against a minor" to include all offenses by child predators

The term "specified offense against a minor" means an offense against a minor that involves any of the following:

(A) An offense (unless committed by a parent or guardian) involving kidnapping.

(B) An offense (unless committed by a parent or guardian) involving false imprisonment.

(C) Solicitation to engage in sexual conduct.

(D) Use in a sexual performance.

(E) Solicitation to practice prostitution.

(F) Video voyeurism as described in section 1801 of title 18.

(G) Possession, production, or distribution of child pornography.

(H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.

(I) Any conduct that by its nature is a sex offense against a minor.

(8) Convicted as including certain juvenile adjudications

The term "convicted" or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of title 18), or was an attempt or conspiracy to commit such an offense.

(9) Sex offender registry

The term "sex offender registry" means a registry of sex offenders, and a notification program, maintained by a jurisdiction.

(10) Jurisdiction

The term "jurisdiction" means any of the following:

(A) A State.

(B) The District of Columbia.

(C) The Commonwealth of Puerto Rico.

(D) Guam.

(E) American Samoa.

(F) The Northern Mariana Islands.

(G) The United States Virgin Islands.

(H) To the extent provided and subject to the requirements of section 16927 of this title, a federally recognized Indian tribe.

(11) Student

The term "student" means an individual who enrolls in or attends an educational institution, including (whether public or private) a secondary school, trade or professional school, and institution of higher education.

(12) Employee

The term "employee" includes an individual who is self-employed or works for any other entity, whether compensated or not.

(13) Resides

The term "resides" means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives.

(14) Minor

The term "minor" means an individual who has not attained the age of 18 years.

4. 42 U.S.C. 16912 provides:

Registry requirements for jurisdictions

(a) Jurisdiction to maintain a registry

Each jurisdiction shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of this subchapter.

(b) Guidelines and regulations

The Attorney General shall issue guidelines and regulations to interpret and implement this subchapter.

5. 42 U.S.C. 16913 provides:

Registry requirements for sex offenders

(a) In general

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration

The sex offender shall initially register—

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry.

That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) Initial registration of sex offenders unable to comply with subsection (b)

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

(e) State penalty for failure to comply

Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

6. 42 U.S.C. 16914 provides:

Information required in registration

(a) Provided by the offender

The sex offender shall provide the following information to the appropriate official for inclusion in the sex offender registry:

(1) The name of the sex offender (including any alias used by the individual).

(2) The Social Security number of the sex offender.

(3) The address of each residence at which the sex offender resides or will reside.

(4) The name and address of any place where the sex offender is an employee or will be an employee.

(5) The name and address of any place where the sex offender is a student or will be a student.

(6) The license plate number and a description of any vehicle owned or operated by the sex offender.

(7) Any other information required by the Attorney General.

(b) Provided by the jurisdiction

The jurisdiction in which the sex offender registers shall ensure that the following information is included in the registry for that sex offender:

(1) A physical description of the sex offender.

(2) The text of the provision of law defining the criminal offense for which the sex offender is registered.

(3) The criminal history of the sex offender, including the date of all arrests and convictions; the status of parole, probation, or supervised release; registration status; and the existence of any outstanding arrest warrants for the sex offender.

(4) A current photograph of the sex offender.

(5) A set of fingerprints and palm prints of the sex offender.

(6) A DNA sample of the sex offender.

(7) A photocopy of a valid driver's license or identification card issued to the sex offender by a jurisdiction.

(8) Any other information required by the Attorney General.

7. 42 U.S.C. 16919 provides:

National Sex Offender Registry

(a) Internet

The Attorney General shall maintain a national database at the Federal Bureau of Investigation for each sex offender and any other person required to register in a jurisdiction's sex offender registry. The database shall be known as the National Sex Offender Registry.

(b) Electronic forwarding

The Attorney General shall ensure (through the National Sex Offender Registry or otherwise) that updated information about a sex offender is immediately transmitted by electronic forwarding to all relevant jurisdictions.

8. 42 U.S.C. 16921 provides:

Megan Nicole Kanka and Alexandra Nicole Zapp Community Notification Program

(a) Establishment of Program

There is established the Megan Nicole Kanka and Alexandra Nicole Zapp Community Notification Pro-

gram (hereinafter in this section referred to as the "Program").

(b) Program notification

Except as provided in subsection (c), immediately after a sex offender registers or updates a registration, an appropriate official in the jurisdiction shall provide the information in the registry (other than information exempted from disclosure by the Attorney General) about that offender to the following:

(1) The Attorney General, who shall include that information in the National Sex Offender Registry or other appropriate databases.

(2) Appropriate law enforcement agencies (including probation agencies, if appropriate), and each school and public housing agency, in each area in which the individual resides, is an employee or is a student.

(3) Each jurisdiction where the sex offender resides, is an employee, or is a student, and each jurisdiction from or to which a change of residence, employment, or student status occurs.

(4) Any agency responsible for conducting employment-related background checks under section 5119a of this title.

(5) Social service entities responsible for protecting minors in the child welfare system.

(6) Volunteer organizations in which contact with minors or other vulnerable individuals might occur.

(7) Any organization, company, or individual who requests such notification pursuant to procedures established by the jurisdiction.

(c) Frequency

Notwithstanding subsection (b), an organization or individual described in subsection (b)(6) or (b)(7) may opt to receive the notification described in that subsection no less frequently than once every five business days.

9. 42 U.S.C. 16922 provides:

Actions to be taken when sex offender fails to comply

An appropriate official shall notify the Attorney General and appropriate law enforcement agencies of any failure by a sex offender to comply with the requirements of a registry and revise the jurisdiction's registry to reflect the nature of that failure. The appropriate official, the Attorney General, and each such law enforcement agency shall take any appropriate action to ensure compliance.

10. 42 U.S.C. 16928 provides:

Registration of sex offenders entering the United States

The Attorney General, in consultation with the Secretary of State and the Secretary of Homeland Security, shall establish and maintain a system for informing the relevant jurisdictions about persons entering the United States who are required to register under this subchapter. The Secretary of State and the Secretary of Homeland Security shall provide such infor-

mation and carry out such functions as the Attorney General may direct in the operation of the system.

11. 42 U.S.C. 16941 provides:

Federal assistance with respect to violations of registration requirements

(a) In general

The Attorney General shall use the resources of Federal law enforcement, including the United States Marshals Service, to assist jurisdictions in locating and apprehending sex offenders who violate sex offender registration requirements. For the purposes of section 566(e)(1)(B) of title 28, a sex offender who violates a sex offender registration requirement shall be deemed a fugitive.

(b) Authorization of appropriations

There are authorized to be appropriated such sums as may be necessary for fiscal years 2007 through 2009 to implement this section.

12. 42 U.S.C. 14071 (2006) (repealed 2009) provided in pertinent part:

Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program

(a) In general

(1) State guidelines

The Attorney General shall establish guidelines for State programs that require—

(A) a person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense to register a current address for the time period specified in subparagraph (A) of subsection (b)(6) of this section; and

(B) a person who is a sexually violent predator to register a current address for the time period specified in subparagraph (B) of subsection (b)(6) of this section.

* * * * *

(b) Registration requirement upon release, parole, supervised release, or probation

An approved State registration program established under this section shall contain the following elements:

(1) Duties of responsible officials

(A) If a person who is required to register under this section is released from prison, or placed on parole, supervised release, or probation, a State prison officer, the court, or another responsible officer or official, shall—

(i) inform the person of the duty to register and obtain the information required for such registration;

(ii) inform the person that if the person changes residence address, the person shall report the change of address as provided by State law;

(iii) inform the person that if the person changes residence to another State, the per-son shall report the change of address as provided by State law and comply with any registration requirement in the new State of residence, and inform the person that the person must also register in a State where the person is employed, carries on a vocation, or is a student;

(iv) obtain fingerprints and a photograph of the person if these have not already been obtained in connection with the offense that triggers registration; and

(v) require the person to read and sign a form stating that the duty of the person to register under this section has been explained.

(B) In addition to the requirements of subparagraph (A), for a person required to register under subparagraph (B) of subsection (a)(1) of this section, the State prison officer, the court, or another responsible officer or official, as the case may be, shall obtain the name of the person, identifying factors, anticipated future residence, offense history, and documentation of any treatment received for the mental abnormality or personality disorder of the person.

(2) Transfer of information to State and FBI; participation in national sex offender registry

(A) State reporting

State procedures shall ensure that the registration information is promptly made available to

a law enforcement agency having jurisdiction where the person expects to reside and entered into the appropriate State records or data system. State procedures shall also ensure that conviction data and fingerprints for persons required to register are promptly transmitted to the Federal Bureau of Investigation.

(B) National reporting

A State shall participate in the national database established under section 14072(b) of this title in accordance with guidelines issued by the Attorney General, including transmission of current address information and other information on registrants to the extent provided by the guidelines.

(3) Verification

(A) For a person required to register under subparagraph (A) of subsection (a)(1) of this section, State procedures shall provide for verification of address at least annually.

(B) The provisions of subparagraph (A) shall be applied to a person required to register under subparagraph (B) of subsection (a)(1) of this section, except that such person must verify the registration every 90 days after the date of the initial release or commencement of parole.

(4) Notification of local law enforcement agencies of changes in address

A change of address by a person required to register under this section shall be reported by the person in the manner provided by State law. State

procedures shall ensure that the updated address information is promptly made available to a law enforcement agency having jurisdiction where the person will reside and entered into the appropriate State records or data system.

(5) Registration for change of address to another State

A person who has been convicted of an offense which requires registration under this section and who moves to another State, shall report the change of address to the responsible agency in the State the person is leaving, and shall comply with any registration requirement in the new State of residence. The procedures of the State the person is leaving shall ensure that notice is provided promptly to an agency responsible for registration in the new State, if that State requires registration.

* * * * *

13. *The National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38,030, 38,065-38,067 (July 2, 2008), provide in pertinent part:

* * * * *

X. Keeping the Registration Current

There are a number of provisions in SORNA that are designed to ensure that changes in registration information are promptly reported, and that the registration information is kept fully up to date in all jurisdictions in which the sex offender is required to register:

Section 113(a) provides that a sex offender must keep the registration current in each jurisdiction in which the sex offender resides, is an employee, or is a student.

Section 113(c) provides that a sex offender must, not later than three business days after each change of name, residence, employment, or student status, appear in person in at least one jurisdiction in which the sex offender is required to register and inform that jurisdiction of all changes in the information required for that sex offender in the sex offender registry. It further provides that that information must immediately be provided to all other jurisdictions in which the sex offender is required to register.

Section 119(b) provides that updated information about a sex offender must be immediately transmitted by electronic forwarding to all relevant jurisdictions.

Section 121(b)(3) provides that immediately after a sex offender registers or updates a registration, the information in the registry (other than any exempted from disclosure by the Attorney General) must be provided to each jurisdiction where the sex offender resides, is an employee, or is a student, and each jurisdiction from or to which a change of residence, employment, or student status occurs.

Section 128 directs the Attorney General, in consultation with the Secretary of State and the Secretary of Homeland Security, to establish a system for informing relevant jurisdictions about persons entering the United States who are required to register under SORNA.

Implementation of these provisions requires the definition of implementation measures that can be carried out by the individual jurisdictions, whose col-

lective effect will be to realize these provisions' objectives. The remainder of this Part of these Guidelines details the required implementation measures.

A. Changes of Name, Residence, Employment, or School Attendance

The in-person appearance requirements of section 113(c) described above serve to ensure—in connection with the most substantial types of changes bearing on the identification or location of sex offenders (name, residence, employment, school attendance)—that there will be an opportunity to obtain all required registration information from sex offenders in an up to date form, including direct meetings for this purpose between the sex offenders and the personnel or agencies who will be responsible for their registration. The purposes served by in-person appearances under the SORNA standards are further explained in Part XI of these Guidelines, in relation to the periodic in-person appearance requirements of section 116.

The required implementation measures for the appearances required by section 113(c)—and other information updating/sharing and enforcement provisions under SORNA as they bear on such appearances—are as follows:

Residence Jurisdictions: Each jurisdiction must require a sex offender who enters the jurisdiction to reside, or who is registered in the jurisdiction as a resident and changes his or her name or place of residence within the jurisdiction, to appear in person to register or update the registration within three business days. Also, each jurisdiction in which a sex offender is registered as a resident must:

Require the sex offender to inform the jurisdiction if the sex offender intends to commence residence, employment, or school attendance in another jurisdiction; and

If so informed by the sex offender, notify that other jurisdiction by transmitting the sex offender's registration information (including the information concerning the sex offender's expected residence, employment, or school attendance in that jurisdiction) immediately by electronic forwarding to that jurisdiction.

Employment Jurisdictions: Each jurisdiction must require a sex offender who commences employment in the jurisdiction, or changes employer or place of employment in the jurisdiction, to appear in person to register or update the registration within three business days.

School Jurisdictions: Each jurisdiction must require a sex offender who commences school attendance in the jurisdiction, or changes the school attended or place of school attendance in the jurisdiction, to appear in person to register or update the registration within three business days.

Information Sharing: In all cases in which a sex offender makes an in-person appearance in a jurisdiction and registers or updates a registration as described above, the jurisdiction must immediately transmit by electronic forwarding the registration information for the sex offender (including any updated information concerning name, residence, employment, or school attendance provided in the appearance) to all other jurisdictions in which:

The sex offender is or will be required to register as a resident, employee, or student; or

The sex offender was required to register as a resident, employee, or student until the time of a change of residence, employment, or student status reported in the appearance, even if the sex offender may no longer be required to register in that jurisdiction in light of the change of residence, employment, or student status.

Failure to Appear: If a jurisdiction is notified that a sex offender is expected to commence residence, employment, or school attendance in the jurisdiction, but the sex offender fails to appear for registration as required, the jurisdiction must inform the jurisdiction that provided the notification that the sex offender failed to appear, and must follow the procedures for cases involving possible violations of registration requirements, as discussed in Part XIII of these Guidelines.

Defining changes in such matters as residence and employment may present special difficulties in relation to sex offenders who lack fixed residence or employment. For example, a homeless sex offender may sleep on a different [*38,066] park bench each night. Or the employer of a sex offender who does day labor, working for whatever contractor hires him on a given day, may change on a daily basis. In such cases, a jurisdiction is not required to treat all such changes as changes in residence or employment status that bring into play the requirement to conduct an in-person appearance within three business days for purposes of reporting the change. Rather, as discussed in Part VI of these Guidelines, the information in the registry describing the places of residence or employment for sex offenders who lack fixed residence or employment may be in more general terms, and jurisdictions may

limit their reporting requirements to changes that would entail some modification of the registry information relating to these matters.

In one respect, the foregoing procedures for updating registration information through in-person appearances do not fully ensure that registrations will be kept current with respect to residence, employment, and school attendance information, because they relate to situations in which future information about these matters is available. But that is not always the case. For example, a transient sex offender may be leaving the jurisdiction in which he is registered as a resident, but may be unable to say where he will be living thereafter. Or a sex offender registered as an employee or student in a jurisdiction may quit his job or leave school, but may have no prospect for subsequent employment or education at the time. If such changes were not reported, the affected jurisdictions' registries would not be kept current, but rather would contain outdated information showing sex offenders to be residing, employed, or attending school in places where they no longer are. Accordingly, a jurisdiction in which a sex offender is registered as a resident, employee, or student must also require the sex offender to inform the jurisdiction if the sex offender is terminating residence, employment, or school attendance in the jurisdiction, even if there is no ascertainable or expected future place of residence, employment, or school attendance for the sex offender.

* * * * *

C. International Travel

A sex offender who moves to a foreign country may pass beyond the reach of U.S. jurisdictions and hence

may not be subject to any enforceable registration requirement under U.S. law unless and until he or she returns to the United States. But effective tracking of such sex offenders remains a matter of concern to the United States and its domestic jurisdictions, and some measures relating to them are necessary for implementation of SORNA.

Relevant provisions include SORNA § 128, which directs the Attorney General to establish a system for informing domestic jurisdictions about persons entering the United States who are required to register under SORNA, and 18 U.S.C. 2250(a)(2)(B), which makes it a federal crime for a sex offender to travel in foreign commerce and knowingly fail to register or update a registration as required by SORNA. To carry out its responsibilities under these provisions, the Department of Justice needs to know if sex offenders registered in U.S. jurisdictions are leaving the country, since such offenders will be required to resume registration if they later return to the United States to live, work, or attend school while still within their registration periods. Also, both for sex offenders who are convicted in the United States and then go abroad, and for sex offenders who are initially convicted in other countries, identifying such sex offenders when they enter or reenter the United States will require cooperative efforts between the Department of Justice (including the United States Marshals Service) and agencies of foreign countries. As a necessary part of such cooperative activities, foreign authorities may expect U.S. authorities to inform them about sex offenders coming to their jurisdictions from the United States, in return for their advising the United States about sex offenders coming to the United States from

their jurisdictions. For this reason as well, federal authorities in the United States will need information about sex offenders leaving domestic jurisdictions to go abroad in order to effectively carry out the requirements of SORNA § 128 and enforce 18 U.S.C. 2250(a)(2)(B).

International travel also implicates the requirement of SORNA § 113(a) that sex offenders keep the registration current in all jurisdictions in which they reside, work, or attend school. If a sex offender simply leaves the country [*38,067] and does not inform the jurisdiction or jurisdictions in which he has been registered, then the requirement to keep the registration current will not have been fulfilled. Rather, the registry information in the domestic jurisdictions will show that the sex offender is residing in the jurisdiction (or present as an employee or student) when that is no longer the case.

In addition, a sex offender who goes abroad may remain subject in some respects to U.S. jurisdiction. For example, a sex offender may be leaving to live on an overseas U.S. military base, as a service member, dependent, or employee, or to work as or for a U.S. military contractor in another country. In such cases, notification about the individual's status as a sex offender and intended activities abroad is of interest to federal authorities, because the presence of sex offenders implicates the same public safety concerns in relation to communities abroad for which the United States has responsibility (such as U.S. military base communities in foreign countries) as it does in relation to communities within the United States.

The following requirements accordingly apply in relation to sex offenders who leave the United States:

Each jurisdiction in which a sex offender is registered as a resident must require the sex offender to inform the jurisdiction if the sex offender intends to commence residence, employment, or school attendance outside of the United States.

If so informed by the sex offender, the jurisdiction must: (i) Notify all other jurisdictions in which the sex offender is required to register through immediate electronic forwarding of the sex offender's registration information (including the information concerning the sex offender's expected residence, employment, or school attendance outside of the United States), and (ii) notify the United States Marshals Service and update the sex offender's registration information in the national databases pursuant to the procedures under SORNA § 121(b)(1).

SORNA does not require that all notifications to jurisdictions by sex offenders concerning changes in their registration information be made through in-person appearances. Rather, the in-person appearance requirement of SORNA § 113(c) relates to changes in name, and to changes in residence, employment, or school attendance between jurisdictions or within jurisdictions, which jurisdictions must require sex offenders to report through in-person appearances under the circumstances expressly identified in Subpart A of this Part. The means by which sex offenders are required to report other changes in registration information discussed in this Part are matters that jurisdictions may determine in their discretion.

* * * * *

No. 15-5238

In The
Supreme Court of the United States

LESTER RAY NICHOLS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 3

I. The government's underlying premise is incorrect: a plain-text reading of SORNA does not risk the accuracy of sex offender registries 3

II. The recent amendment to SORNA undermines the government's position 8

III. The government's definition of an "involved" jurisdiction is not supported by the text 11

IV. SORNA does not require a sex offender to unregister in the departure jurisdiction before the offender changes his residence 15

A. Current information is not the same as future information 16

B. A change, not an anticipated change, triggers a registration obligation under SORNA 16

C. Section 16914(a)(3) is not a departure notification provision 19

TABLE OF CONTENTS – Continued

Page

V. The government misreads SORNA's statutory history, misconstrues the guidelines, and confuses the question presented with its discussion of transient sex offenders 23

VI. If nothing else, the rule of lenity controls 26

CONCLUSION..... 27

TABLE OF AUTHORITIES

Page

CASES

Ali v. BOP, 552 U.S. 214 (2008) 10

Carr v. United States, 560 U.S. 438 (2010) 13, 14

Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992) 11

Credit Suisse Securities v. Simmonds, 132 S.Ct. 1414 (2012) 19

Kebodeaux v. United States, 133 S.Ct. 2496 (2013) 18

New Process Steel, L.P. v. NLRB, 560 U.S. 674 (2010) 12

Rumsfeld v. Forum for Academic & Institutional Rights, 547 U.S. 47 (2006) 9

Stone v. INS, 514 U.S. 386 (1995) 10

United States v. Granderson, 511 U.S. 39 (1994) 26

United States v. Lunsford, 725 F.3d 859 (8th Cir. 2013) 17

United States v. Murphy, 664 F.3d 798 (10th Cir. 2011) 17

West v. Gibson, 527 U.S. 212 (1999) 22

STATUTES

18 U.S.C. § 2250 ..... 10, 11, 14

18 U.S.C. § 2250(a) 13

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 2250(a)(2)(B) 6
18 U.S.C. § 2250(a)(3) 15, 19
18 U.S.C. § 2250(b) 18, 25
18 U.S.C. § 2250(c) 18, 25
18 U.S.C. § 3624(c) 21
18 U.S.C. § 4042(c) 21
42 U.S.C. § 14071(b)(5) (1997) 4
42 U.S.C. § 14072(g) (2000) 18
42 U.S.C. § 14072(g)(4) (2000) 23
42 U.S.C. § 14072(g)(5) (2000) 23
42 U.S.C. § 16901 7
42 U.S.C. § 16911(10) 1, 7, 14
42 U.S.C. § 16911(13) 25
42 U.S.C. § 16912(b) 24
42 U.S.C. § 16913 ..... 5, 8, 9
42 U.S.C. § 16913(a) 11, 12, 13, 14
42 U.S.C. § 16913(b) 2, 18, 19
42 U.S.C. § 16913(b)(1) 19, 21
42 U.S.C. § 16913(b)(2) 19
42 U.S.C. § 16913(c) ..... *passim*
42 U.S.C. § 16914 ..... *passim*
42 U.S.C. § 16914(a) 9
42 U.S.C. § 16914(a)(3) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 16914(c) 10
42 U.S.C. § 16915 7
42 U.S.C. § 16916 .....16, 19
42 U.S.C. § 16917(a)(3).....21
42 U.S.C. § 16921(b)(3).....*passim*
42 U.S.C. § 16925 6
Ala. Code § 15-20A-10(c)(1).....4
Ala. Code § 15-20A-12 25
Am. Samoa Code § 46.2801(b).....4
Cal. Penal Code § 290.011 4
D.C. Code § 22-4014 4
Fla. Stat. § 943.0435(4)(b)(2).....25
9 Guam Code § 89.03(f)(1) 4
730 Ill. Comp. Stat. 150/6.....4
Ind. Code § 11-8-11-12 4
Iowa Code § 692A.104(2).....4
Kan. Stat. § 22-4903 5
Kan. Stat. § 22-4905(e).....25
Kan. Stat. § 22-4905(g).....4
Kan. Stat. § 22-4905(o).....4, 5
Me. Rev. Stat. tit. 34-A § 11222(5) 4
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TABLE OF AUTHORITIES – Continued

Page

Nev. Rev. Stat. § 179D.470(1) 4

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Or. Rev. Stat. § 181.806(3)(a)(B) 4

Pa. Cons. Stat. § 9799.15(g)(2) 4

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Utah Code § 77-41-105(3) 4

14 V.I. Code § 1724(c) 4

Vt. Stat. Ann. tit. 13, § 5407(h) 25

OTHER AUTHORITIES

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INTRODUCTION

The Sex Offender Registration and Notification Act ("SORNA") requires a sex offender to register or update his registration not later than three business days after a change of residence, and to do so in a jurisdiction where the offender presently resides, works, or attends school. 42 U.S.C. § 16913(c). But SORNA does not apply in foreign countries. 42 U.S.C. § 16911(10). And, until recently, Congress did not include a provision within SORNA for the registration of sex offenders who leave the United States. Thus, when Lester Ray Nichols moved from Kansas to the Philippines, and did not otherwise work or attend school within the United States, SORNA's plain text did not require him to register or update his registration.

The government agrees that Mr. Nichols did not have to register in the Philippines. But it disagrees that Mr. Nichols was not required to update his Kansas registration to reflect his move to the Philippines. In practice, the government construes SORNA to require an offender to unregister in a former jurisdiction. The government advances this policy-based argument in order to ensure the accuracy of sex offender registries.

But the government is wrong that a plain-text reading of SORNA creates inaccurate registries. Each jurisdiction requires its sex offenders to report out-of-jurisdiction changes of residence. These requirements ensure the accuracy of sex offender registries. There

is no need to construe SORNA to include an analogous requirement not previously found within SORNA's text. This is especially true now that Congress has amended SORNA to include departure notification for international travel.

The government's construction of SORNA is inconsistent with its text in three critical respects. First, 42 U.S.C. § 16913(c) expressly requires an offender to register or update a registration in at least one jurisdiction where the offender resides, works, or attends school, and not, as the government contends, in a jurisdiction where "the offender continues to appear on its registry as a current resident." This Court presumes that Congress means what it actually says in a statute. There is no reason not to apply this fundamental canon of construction here.

Second, the government's construction of § 16913(c) misstates what is "current" information and renders meaningless the provision's timing requirements. It is the change itself that triggers a requirement to provide current information. The government's assertion that an offender who moves to a foreign country must update the information "before" the change occurs has no textual support. Congress could have structured § 16913(c) in this manner, as evidenced by § 16913(b), but it did not.

Third, the government misunderstands 42 U.S.C. § 16914(a)(3). This provision does not independently require an offender to report an anticipated change of residence before the change occurs. Instead, Congress

included the verb "will reside" to cover offenders who initially register while in prison. Congress wanted to ensure that those offenders initially reported their expected addresses after release from imprisonment. The government further errs when it conflates "will reside" with "will no longer reside." Those two phrases are not synonymous.

The government also misunderstands the statutory history, inaccurately describes its own guidelines, and unhelpfully invokes perceived problems with transient sex offenders. If nothing else, when the competing interpretations are weighed, the rule of lenity precludes the government's atextual construction of the statute.

ARGUMENT

I. The government's underlying premise is incorrect: a plain-text reading of SORNA does not risk the accuracy of sex offender registries.

1. In 1997, some nine years before SORNA was enacted, Congress directed the states to include departure notification[1] provisions within their own sex offender registry laws. Pet'r Br. 6. This federal requirement was aimed at sex offenders who moved

[1] A departure notification requirement is analogous to a requirement to unregister. The concepts are used interchangeably throughout this brief.

from one state to another state, and it directed the states to require those offenders "to report the change of address to the responsible agency in the State the person is leaving." 42 U.S.C. § 14071(b)(5) (1997). By the time Congress enacted SORNA in 2006, each state had enacted some form of departure notification provision. Pet'r Br. at 6-7. Accordingly, Congress had no need to include, and did not include, within SORNA a departure notification provision.

At present, the laws of each state and enumerated jurisdiction require departure notification.[2] Thus, a plain-text interpretation of SORNA does not result in inaccurate sex offender registries. If a sex offender who moves from a jurisdiction complies with the jurisdiction's provisions, the registries will contain accurate information. If the offender does not comply, the offender can be prosecuted for violating the jurisdiction's law.

In this case, for instance, Kansas criminalizes an offender's failure to provide departure notification. Kan. Stat. § 22-4905(g) (moves in general); Kan. Stat.

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[2] Pet'r Br. 6-7 n.1-2. Some statutes have been renumbered: Ala. Code § 15-20A-10(c)(1); Cal. Penal Code § 290.011; 730 Ill. Comp. Stat. 150/6; Ind. Code § 11-8-11-12; Iowa Code § 692A.104(2); Nev. Rev. Stat. § 179D.470(1); Or. Rev. Stat. § 181.806(3)(a)(B); Pa. Cons. Stat. § 9799.15(g)(2); Utah Code § 77-41-105(3); *see also* Me. Rev. Stat. tit. 34-A § 11222(5); Miss. Code § 45-33-29(1); Neb. Rev. Stat. § 29-4004(4); D.C. Code § 22-4014; 4 P.R. Laws § 536c; 9 Guam Code § 89.03(f)(1); Am. Samoa Code § 46.2801(b); 6 N. Mar. I. Code § 1369(a); 14 V.I. Code § 1724(c).

§ 22-4905(o) (international moves). The failure to provide such notification is punished as a mid-high severity level felony. Kan. Stat. § 22-4903. Thus, state law required Mr. Nichols to unregister in Kansas.

2. The legislative history does not support the government's position, as it suggests. The failure to construe § 16913 to require departure notification would not exacerbate the problem of "missing sex offenders." U.S. Br. 31. Congress sought to tackle this problem not by requiring a sex offender to unregister in the departure jurisdiction, but by requiring the offender to register in the arrival jurisdiction. The House Report cited by the government says that noncompliance "typically occurs when the sex offender moves from one State to another." H.R. Rep. No. 109-218, at 26 (2005) ("House Report"). "When a sex offender fails to register in a State in which he or she resides, there is no effective system by which the States can notify each other about the change in a sex offender's status." *Id.*

The reference to "a State in which he or she resides" is not the departure jurisdiction. If that were true, Congress would have attributed the problem of missing sex offenders to deficiencies in initial registration, not deficiencies in registration via interstate moves. The House Report is also concerned with an actual "change in a sex offender's status," not an anticipated change in status.

To solve this problem, the House Report continues, offenders must provide updated information

within, not before, five days of any change. *Id.* Moreover, "if the sex offender either moves to a new State, works in a new State, or attends school in a new State, the new State is required to notify the other State that the sex offender is doing so in that State." *Id.* Sex offenders would be subject to federal punishment when "they cross a State line and fail to comply with the sex offender registration and notification requirements contained in the legislation." *Id.* The House Report thus confirms that SORNA seeks accurate registries via updated information provided after a triggering change to present jurisdictions. Its aim is not to require offenders to unregister in departure jurisdictions. Congress has left that task to the jurisdictions themselves. *Id.*; 42 U.S.C. §§ 16913(c), 16921(b)(3).

3. The House Report also suggests that Congress had federalism concerns in mind when it drafted SORNA. These concerns are apparent within SORNA's text. *See, e.g.*, 18 U.S.C. § 2250(a)(2)(B) (requiring an interstate-travel element for state sex offenders); 42 U.S.C. § 16913(c) (requiring offenders to update registries only after a change of residence, etc.); 42 U.S.C. § 16925 (states need not comply with SORNA; penalty for noncompliance is loss of funds). Congress sensibly left to each state the power to unregister offenders *within* that state, knowing that, at the time it enacted SORNA, all states required some form of departure notification.

4. The government is also wrong to identify accurate registries as SORNA's "key purpose."

SORNA's key purpose is the protection of the public. 42 U.S.C. §§ 16901, 16911(10). Only recently did Congress amend SORNA to respond to concerns about international child sex tourism. Int'l Megan's Law to Prevent Demand for Child Sex Trafficking, H.R. 515 § 2, 114th Cong. (2015) (text available at U.S. Suppl. Br. 1a). Before this amendment, it was not inconsistent with SORNA's stated purpose to conclude that a sex offender who moves to a foreign country is not required to unregister in the departure jurisdiction. In practice, if Mr. Nichols had informed Kansas of his departure, Kansas would have removed his name from its public registry.[3] The failure to complete this ministerial task is not the threat Congress reacted to when it enacted SORNA. 42 U.S.C. § 16901.

5. If keeping accurate registries was the "key purpose" behind SORNA, offenders who time out of their registration requirements would have an obligation to unregister. But there is nothing in 42 U.S.C. § 16915, or elsewhere in SORNA, that requires an offender who has satisfied his reporting requirement to unregister. The jurisdictions surely complete this task, as they do with departure notification, § 16921(b)(3), thus ensuring that the registries remain accurate.

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[3] "[O]nce an offender moves out of the State of Kansas, they no longer appear on our public website." http://www.kbi.ks.gov/registeredoffender/FAQ.aspx#offenderMoves (last visited February 17, 2016).

6. Moreover, the registries contain "current" information about where an offender "resides." Pet'r Br. 37-39. The accuracy of this information is better ensured when actual changes are reported, as § 16913(c) requires, not anticipated changes. Under the government's construction, it is unclear when an offender must report an anticipated change, whether the offender must also unreport any cancelled anticipated changes, and, if so, when and how the offender must do so. Section 16913 answers none of these questions.

7. In the end, state and federal law work in tandem to ensure that the various registries contain accurate information and that offenders who fail to comply with such laws are punished. The government is thus correct that, at the time Mr. Nichols moved to the Philippines, a registered sex offender was not allowed to move out of the country without telling anyone and that a failure to do so was a crime. But it was not a federal crime (until recently).

II. The recent amendment to SORNA undermines the government's position.

Congress recently amended SORNA. Int'l Megan's Law, *supra*. The amendment is aimed at sex offenders who travel to foreign countries, *id.* § 2, an aim not formerly present within SORNA. As amended, SORNA requires sex offenders to provide notice of travel to foreign countries. *Id.* § 6. The amendment resolves the government's concerns about accurate

registries. There is now no reason to adopt the government's atextual construction of § 16913. Moreover, the amendment confirms that, if Congress had meant to include a departure notification provision at the time of SORNA's enactment, it would have done so, as it now has done. Pet'r Br. 53-55. The amendment undermines the government's argument in three other respects.

1. Section 16914(a) now contains an additional subsection requiring a sex offender to report foreign travel, including, *inter alia*, "anticipated dates[,] places of departure," and the destination "address or other contact information therein." Int'l Megan's Law § 6(a)(1)(B). If § 16914(a)(3) already required an offender to report a future address within a foreign country, as the government contends, Congress would have had no reason to add this provision. *See Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 57-58 (2006) (refusing to interpret a provision "in a way that negates its recent revision").

2. Section 16914 now contains an explicit "time and manner" provision, delegating to the Attorney General the authority to set forth time and manner requirements for offenders to report § 16914 information. Int'l Megan's Law § 6(a)(2). The amendment confirms, contrary to the government's position, that SORNA did not previously require an offender to report changes to § 16914 information at times other than initial registration, in-person verification, or following a § 16913(c) change. *See* Section IV(3),

infra. It further confirms, contrary to the government's position, that the Attorney General had no previous authority to promulgate time and manner requirements. Moreover, adopting the government's construction of § 16914(a)(3) as an independent departure notification requirement would risk coherence and consistency moving forward. *See Ali v. BOP*, 552 U.S. 214, 222 (2008) (courts must interpret recent amendments to "ensure that the statutory scheme is coherent and consistent"). Section 16914(a)(3) would duplicate what § 16914(c) now does.

3. 18 U.S.C. § 2250 now includes a criminal provision punishing sex offenders who are required to register under SORNA, who fail to provide departure notification of intended foreign travel, and who travel or attempt to travel to a foreign country. Int'l Megan's Law § 6(b)(2). This conduct is the conduct at issue here. If Congress just passed a statute to criminalize this conduct, then it was not criminal, or at least not sufficiently clear that it was criminal, prior to the passage of the new legislation. *See Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").

The government admits that SORNA now "capture[s] the kind of conduct underlying petitioner's offense." U.S. Suppl. Br. 3. It no longer needs this Court to adopt its proposed atextual construction of SORNA. And Congress did not enact the provision "just to state an already existing rule." *Stone*, 514 U.S. at 397 Its passage confirms that 18 U.S.C.

§ 2250, as it existed when Mr. Nichols moved to the Philippines, did not unambiguously criminalize his conduct, as the following explains.

III. The government's definition of an "involved" jurisdiction is not supported by the text.

The government advances a policy argument in this case. To the extent that it advances a textual argument at all, the argument rests not on text, but on "context." U.S. Br. 14. The government admits that, in its opinion, the text "does not accurately capture the meaning" of the statute. *Id.* 24. The government asks this Court to interpret § 16913(c)'s phrase "jurisdiction involved pursuant to subsection (a)" to include within its meaning any jurisdiction where "the offender continues to appear on its registry as a current resident." *Id.* In other words, an offender who appears on a registry as a current resident has a duty to unregister when he moves to a different jurisdiction.

1. This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). This is the "first" canon of statutory construction, and the one that "a court should always turn to before all others." *Id.* at 253. "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 254. If Congress truly wanted to

define "jurisdiction involved" to include each jurisdiction where "the offender continues to appear on its registry as a current resident," then Congress surely would have said so in such straightforward language. *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 681 (2010). But it did not.

2. The "jurisdiction involved" in the phrase "at least 1 jurisdiction involved pursuant to subsection (a)" unambiguously identifies an "involved" jurisdiction as one enumerated in § 16913(a) ("each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student"). Thus, a sex offender who changes his name, residence, employment, or student status has three business days after this change to report it to at least one jurisdiction where the offender presently resides, where the offender is an employee, or where the offender is a student. As an example, if John Doe resides in State A, but works in State B, and John Doe moves to State C, he can report this change in person either to State B, where he works, or to State C, where he now presently resides. John Doe is not required to report the change to both jurisdictions. Nor is he required to travel back to State A, the departure jurisdiction, to report the change in person there. Instead, the registration jurisdiction (either State B or State C) would report the changes to State A. 42 U.S.C. § 16921(b)(3).

3. The government does not disagree. It admits that an offender can register in State C (the arrival jurisdiction), and, if he does so, he has no obligation

to unregister in State A (the departure jurisdiction). U.S. Br. 11, 21-22. The text supports this interpretation, but the text does not support the government's supplemental definition of the "involved" jurisdictions in § 16913(a). In support of its supplemental definition, the government cites just one provision – 42 U.S.C. § 16921(b)(3). U.S. Br. 24-25. But this provision does not require a sex offender to do anything. Instead, § 16921(b)(3) requires the registering jurisdiction to provide information to other jurisdictions. This provision thus undermines the government's argument. The jurisdiction, and not the offender, is required to notify the departure jurisdiction of the change, which explains why the offender himself need not provide this notification (and is surely not required to provide it). Pet'r Br. 57.

4. In *Carr v. United States*, 560 U.S. 438 (2010), the government made an atextual argument very similar to the one it makes now. The government asked this Court to interpret the phrase "is required to register under [SORNA]" as "'a shorthand way of identifying those persons who have a [sex-offense] conviction in the classes identified by SORNA.'" *Id.* at 447. This Court rejected the argument:

> [A]s the Government would have it, Congress used 12 words and two implied cross-references to establish that the first element of § 2250(a) is that a person has been convicted of a sex offense. Such contortions can scarcely be called "shorthand." It is far more sensible to conclude that Congress meant the

> first precondition to § 2250 liability to be the one it listed first: a "require[ment] to register under [SORNA]."

Id. So too here. The plain text controls. A "jurisdiction involved under subsection (a)" is "each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student," and is not any jurisdiction where an offender appears as a resident on its registry.[4]

5. The government makes no other argument that an offender still "resides" in Kansas "after" he abandons his Kansas residence. *Id.* For good reason, the government does not rely on the meaning of the term "resides." Congress expressly defined that term as the location of one's home or the place where the offender habitually lives. 42 U.S.C. § 16911(10); Pet'r Br. 25-31. Under this definition, a sex offender does not reside in a jurisdiction where he appears as a current resident on the sex offender registry unless he lives within that jurisdiction. Thus, the government sensibly admits that Mr. Nichols did not reside in Kansas after he abandoned his Kansas residence. U.S. Br. 16-17, 25. And if Mr. Nichols did not reside in Kansas after the change of residence, then Kansas was not an "involved" jurisdiction under a plain-text reading of § 16913(a).

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[4] The government responds to our reliance on *Carr* with a discussion of the specific holding of that case. U.S. Br. 26-28. But we cite *Carr* for its treatment of present-tense verbs, not because the case is factually analogous.

The government's ad hoc suggestion that Mr. Nichols *could have* unregistered "on his way out of town" or "by staying an extra day after moving out of his apartment" is beside the point. U.S. Br. 25. The question is whether Mr. Nichols failed to update his registration "as required by [SORNA]," 18 U.S.C. § 2250(a)(3), not as *permitted* by SORNA. Section 16913(c) does not require an offender to unregister in a jurisdiction "on his way out of town," but instead requires the offender to register in person when he reaches his new jurisdiction.[5]

IV. SORNA does not require a sex offender to unregister in the departure jurisdiction before the offender changes his residence.

The government's new fallback position – that a sex offender who cannot register in the arrival jurisdiction must unregister in the departure jurisdiction – is a novel interpretation of SORNA. The government did not present the argument below. The argument is unsound. It misconstrues the word "current," impermissibly reads the triggering event out of § 16913(c), and unwisely considers § 16914(a)(3) a stand-alone departure notification provision.

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[5] Contrary to the government's suggestion, sex offenders cannot give "concurrent notice in their departure jurisdiction." U.S. Br. 25. Section 16913(c) requires in-person registration. Unless the sex offender resides at a registry office, concurrent notice is impossible.

A. Current information is not the same as future information.

The government spends much time trying to explain why keeping a registration "current" would include reporting future information. U.S. Br. 11, 15, 18-19. For instance, the government confusingly opines that "an offender may indeed provide information about what his residence will be (or not be) in the future, in order to keep his registration information 'current.'" *Id.* 15. In support, the government unhelpfully cites the Dictionary Act for the proposition that words used in the present tense include the future tense. Br. 19. But the word "current" is not a present-tense verb. Each time Congress uses the word "current," it does not also mean "future." If that were true, the requirement in 42 U.S.C. § 16916 that an offender "allow the jurisdiction to take a current photograph" at each in-person verification would allow for a "future photograph" instead. This is not a plausible interpretation of the word "current." Section 16913(c)'s aim is to keep "the registration current," not to keep the registration "future." And a current registration does not include future information, just as a current photograph is not a future photograph.

B. A change, not an anticipated change, triggers a registration obligation under SORNA.

1. The Tenth Circuit affirmed Mr. Nichols's conviction because of his failure to update his registration after (not before) he changed residences. J.A.

125-126 (the change of residence "triggered a registry obligation in Kansas, which Mr. Nichols did not fulfill"). *See also United States v. Murphy*, 664 F.3d 798, 801 (10th Cir. 2011) (a "change of residence" "sparks a reporting duty"); *United States v. Lunsford*, 725 F.3d 859, 861 (8th Cir. 2013) (a "change of residence" "triggers an obligation" to register).

The government does not dispute that a "change" triggers a reporting obligation. U.S. Br. 27. It concedes that pre-departure notification is not a requirement in all cases. *Id.* 21. But it contends that a failure to provide notice is a federal crime if the offender cannot register in a new jurisdiction within the three-business-day deadline. *Id.* 21-22. Even then, though, this notice does not fulfill § 16913(c)'s reporting obligation if the offender moves to a jurisdiction covered by SORNA. This offender, according to the government, must still register in the new jurisdiction. *Id.* Only if the offender moves to a jurisdiction not covered by SORNA is pre-departure notification required by SORNA. *Id.* 18, 26.[6]

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[6] This case does not turn on whether a move from point A to point B constitutes one or two "changes of residence." If the government is correct, however, that a move from point A to point B constitutes two changes of residence, U.S. Br. 21, then an offender effectively has a minimum of two separate three-business-day periods to report the changes. The offender can spend as much as five days in the departure jurisdiction before telling the jurisdiction that he has abandoned his residence, then the offender has another five days upon arrival to register a new address in the arrival jurisdiction. Thus, an offender

(Continued on following page)

Of course, the statute does not say any of this. The statute does not set forth a conditional obligation to unregister in cases where registration within three days is not required or impossible. To the extent that registration is impossible, 18 U.S.C. § 2250(b) (now § 2250(c)) provides an affirmative defense to prosecution.

2. The government does not explain how an offender would know about this federal conditional obligation. As previously explained, the phrase "not later than 3 business days after" is naturally read as a triggering event which then requires registration. Pet'r Br. 33-37 Especially with respect to § 16913(b), the government's silence is critical.

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effectively has ten days to report a new address in a new jurisdiction, which is exactly the time period required in SORNA's predecessor legislation. 42 U.S.C. § 14072(g) (2000). But SORNA "imposed somewhat different limits upon the frequency with which offenders must update their registrations." *Kebodeaux v. United States*, 133 S.Ct. 2496, 2504 (2013). In contrast to its position here, the government's brief in *Kebodeaux* contrasted Texas's registration requirement, which required registration both before and after a change of residence, with SORNA's requirement. *See* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-418_pet.authcheckdam.pdf at 46 (last visited February 17, 2016).

The government's position also does nothing to address "residency limbo," as the government never indicates what an offender must do, or when he must do it, between departure notification and arrival in a new jurisdiction.

In two clearly delineated subsections in § 16913(b), Congress expressly accounted for initial registration of convicted sex offenders: "(1) before [a triggering event]; or (2) not later than 3 business days after [a triggering event]." Pet'r Br. 11a. The government offers no reason why Congress, in the next subsection, would have replaced this express dichotomy for an implicit sometimes-permissive-sometimes-required conditional obligation. If Congress wanted to require the offender, in certain circumstances, to give notice "before" the "change," it would have set forth this requirement within the text of § 16913(c), in a manner structurally similar to § 16913(b). *See, e.g.*, *Credit Suisse Securities v. Simmonds*, 132 S.Ct. 1414, 1420 (2012) ("Had Congress intended this result, it most certainly would have said so.").

Section 16913(c) plainly requires an offender to update a sex offender registry, but only after the offender changes his name, residence, employment, or student status. Until the change occurs, an offender is not "required by" SORNA, 18 U.S.C. § 2250(a)(3), to update the information in the registry.

C. Section 16914(a)(3) is not a departure notification provision.

Section 16914 is a non-exhaustive list of information to be included in sex offender registries. This information would be reported at initial registration and periodically "verified," 42 U.S.C. § 16916. As just discussed, § 16913(c) also requires an offender to

update the information "not later than three business days after" an enumerated change. Until a "change" occurs, however, an offender is not required to inform an involved jurisdiction of changes in the § 16914 registration information. SORNA's plain text did not require an offender to report changes to this information at other times.

1. Section 16914(a)(3) lists "[t]he address of each residence at which the sex offender resides or will reside." The government cites "will reside" in support of its conditional pre-departure notification requirement. U.S. Br. 11, 19-21, 26. But the government never acknowledges that, prior to the recent amendment, § 16914 did not include its own time and manner provision. Without such a provision, nothing within SORNA required an offender to provide any information within § 16914 at times other than initial registration, periodic verifications, or within three business days of an enumerated change in § 16913(c). To require updated information at other times would render these timing requirements meaningless. Pet'r Br. 33-37.

2. Congress instead included "will reside" in § 16914(a)(3) to cover situations where offenders initially register in prison, as the government itself recognizes. National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030-01 at 38055 (July 2, 2008). The government downplays this statement as just one example, and now quotes from two other sections in the guidelines. U.S. Br. 20. But the guidelines do not include another example

beyond the situation where an offender "is not yet residing in the place or location to which he or she expects to go following release." 73 Fed. Reg. 38030-01 at 38055. And the other two quotes, which instruct *jurisdictions* (not sex offenders) to require departure notification, do not cite or rely on § 16914(a)(3) as the underlying authority. U.S. Br. 20 (citing 73 Fed. Reg. 38030-01 at 38065, 38067).[7]

The government also criticizes the argument as "[l]acking support in the statute itself." There is statutory support, however. *See* 42 U.S.C. §§ 16913(b)(1) (requiring registration while in prison), 16917(a)(3) (requiring law enforcement to ensure that offenders register in prison), 16921(b)(3) (requiring law enforcement to provide information to a jurisdiction "to which" a change of residence occurs).

3. In 18 U.S.C. § 4042(c), Congress directed the Bureau of Prisons to provide notification when a sex offender is released from custody, parole, probation, or supervised release. The provision requires the Bureau of Prisons to notify officials in the jurisdiction "in which the person will reside." *Id.* This provision confirms that an offender serving a term of imprisonment reports his future address prior to his release from prison and that Congress's parallel use of "will

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[7] Many offenders are released to halfway houses as a transition from prison to the community. 18 U.S.C. § 3624(c). This fact might explain why the guidelines include the phrase "for example" when referring to release "from imprisonment."

reside" in § 16914(a)(3) was similarly aimed at this scenario.

4. The House Report summarizes § 16914(a)(3)'s requirements in the singular, not the plural. House Report 46 (a sex offender must provide "the sex offender's address"). It does the same with employment and student status. *Id.* This summary is further evidence that Congress included "will reside" in § 16914(a)(3) to ensure that prisoners report a future, post-release address, and not the address of the prison.

5. Even if "will reside" means something more, it does not mean "will no longer reside." The government's argument is not that Mr. Nichols failed to tell Kansas where he "will reside" in the Philippines, but that he failed to tell Kansas that he "will no longer reside" in Kansas. U.S. Br. 21. But a requirement to report a future address is not the same as a requirement to unreport a soon-to-be past address. Congress could have said "resides, will reside, or will no longer reside," but it did not. Section 16914(a)(3) is not a departure notification provision.

6. Finally, Mr. Nichols's conviction was not affirmed on appeal because he failed to update the § 16914 information before the change of residence. The question presented involves a failure to update after the change, as required by § 16913(c). It would be improper to affirm the conviction on a ground outside of the question presented. *West v. Gibson*, 527 U.S. 212, 223 (1999) (remanding case after refusing to

consider matters outside the scope of the question presented).

V. The government misreads SORNA's statutory history, misconstrues the guidelines, and confuses the question presented with its discussion of transient sex offenders.

1. Citing § 16921(b)(3)'s requirement that a jurisdiction report information "from or to which a change of residence" occurs, the government contends that SORNA "replaced a one-way flow of information (from the departure jurisdiction to the new one) with a system that allows information to flow in either direction." U.S. Br. 38. The government is wrong. This two-way system existed prior to SORNA. 42 U.S.C. §§ 14072(g)(4), (g)(5) (2000). The relevant difference between SORNA and its predecessor statute is that SORNA, prior to the recent amendment, did not include a departure notification provision. Pet'r Br. 52-59. The government never explains away that distinction.

2. The government also misreads its own guidelines. The government implies that the guidelines are aimed at sex offenders, rather than at the jurisdictions responsible for administering sex offender registries. U.S. Br. 20. The government is wrong. The guidelines instruct jurisdictions, not sex offenders. 73 Fed. Reg. 38030-01 at 38030 ("These final guidelines provide guidance and assistance to the states and

other jurisdictions."); 42 U.S.C. § 16912(b) (delegating the authority to issue guidelines "for jurisdictions").

The guidelines further recognize that "requiring that changes of residence be reported before the sex offender moves, rather than within three business days following the move" is a "more stringent" requirement than "the SORNA minimum standards." 73 Fed. Reg. 38030-01 at 38046. This is our point. The government counters that this is only a "more stringent requirement" when an offender cannot register in the arrival jurisdiction. U.S. Br. 29. But the "International Travel" section states that any requirement to report such travel does not fall under § 16913(c), but instead would be "matters that jurisdictions may determine in their discretion." 73 Fed. Reg. 38030-01 at 38066. The recent amendment, which does not amend § 16913(c), confirms that moves to foreign countries are not governed by § 16913(c).

3. Finally, the government invokes the "transient sex offender" to lend support for its sometimes-permissive-sometimes-required, unregister-first-then-register-second conditional obligation in § 16913(c). U.S. Br. 23. But this case is not about a transient sex offender. Mr. Nichols moved from Kansas to the Philippines. The government confuses the issue when it brings in collateral matters.

Thus, it is not that it is impossible "to explain how a sex offender who takes more than three business days to move can still comply with SORNA,"

U.S. Br. 23, it is that there is no need to explain it. If there were a need, SORNA's text answers the question, just as it answers the question presented in this case. *See* 42 U.S.C. § 16911(13) (defining the term "resides" to include a "place where the individual habitually lives"); 18 U.S.C. § 2250(b) (now § 2250(c)) (providing an affirmative defense to prosecution if an individual's failure to comply with SORNA results from uncontrollable circumstances not recklessly contributed to by the defendant).

Moreover, the vast majority of state registration statutes expressly cover transient offenders. Kansas, for instance, obligates transients to report in person at least every 30 days. Kan. Stat. § 22-4905(e). Other states have similar transient check-in requirements ranging from daily (*e.g.*, Vt. Stat. Ann. tit. 13, § 5407(h)), to weekly (*e.g.*, Ala. Code § 15-20A-12) to monthly (*e.g.*, Fla. Stat. § 943.0435(4)(b)(2)). As with other aspects of registration, the states have properly taken the lead to register offenders within their borders.

The question presented is not whether or how a homeless sex offender must register. The question is whether it was a federal crime to move to a foreign country without unregistering in a former jurisdiction. The plain text of SORNA answers that question in the negative.

VI. If nothing else, the rule of lenity controls.

The government cites this Court's precedent requiring a "grievous ambiguity" to invoke the rule of lenity. U.S. Br. 40. But this Court does not always require a "grievous ambiguity." Pet'r Br. 60-62. Instead, the question often asked is whether the government's position is unambiguously correct. *United States v. Granderson*, 511 U.S. 39, 54 (1994). As a textual matter, the answer is no. The government's argument is not rooted in SORNA's text, but rather in its "context." U.S. Br. 14. The government asks what SORNA "contemplates," not what SORNA says. *Id.* 17. It looks beyond the text to "capture the meaning" of § 16913(c). *Id.* 24. It considers "current" information analogous with "future" information. *Id.* 26. It cobbles together a conditional obligation to provide information at a time and in a manner different than the text requires. *Id.* 21-26. The government's atextual argument is not unambiguously correct. The passage of International Megan's Law confirms this. If nothing else, the rule of lenity controls.

CONCLUSION

For the foregoing reasons, and those stated in the opening brief, this Court should reverse the Tenth Circuit's judgment affirming Mr. Nichols's conviction.

Respectfully submitted,

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No. 15-5238

In the Supreme Court of the United States

LESTER RAY NICHOLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES

Petitioner's opening brief and the government's brief referred to proposed legislation that would create a new federal statutory obligation for sex offenders to provide notification to sex-offender registries whenever they plan to travel outside the United States. See Pet. Br. 49 n.16, 59 n.20; U.S. Br. 39-40 & n.8. After those briefs were filed, the House of Representatives agreed to a Senate-passed version of such a bill,[1] and the President has now signed H.R. 515, the International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders (International Megan's Law).[2]

[1] See 162 Cong. Rec. H387-H394 (daily ed. Feb. 1, 2016).

[2] See The White House, *Statement by the Press Secretary on H.R. 515, H.R. 4188, S. 2152* (Feb. 8, 2016), https://www.whitehouse.gov/the-press-office/2016/02/08/statement-press-secretary-hr-515-hr-4188-s-2152-0. The text of the enrolled bill that was presented to the President on February 4, 2016, is available at https://www.congress.gov/114/bills/hr515/BILLS-114hr515enr.pdf.

1. The International Megan's Law provides for notification by the Department of Homeland Security and the Department of Justice to foreign governments about travel to their countries by sex offenders from the United States. See §§ 4-5. The statute also encourages the Executive Branch to "seek reciprocal international agreements or arrangements" to implement the statute and to obtain information from other countries about "the travel of sex offenders to the United States." *Id.* § 7.

As pertinent here, Section 6 of the International Megan's Law (reprinted in the appendix to this brief, *infra*, 2a-4a) creates a new statutory obligation for sex offenders to provide notice when they intend to travel outside the United States. It amends the list of required sex-offender-registration information by inserting the following paragraph into 42 U.S.C. 16914(a):

> (7) Information relating to intended travel of the sex offender outside the United States, including any anticipated dates and places of departure, arrival, or return, carrier and flight numbers for air travel, destination country and address or other contact information therein, means and purpose of travel, and any other itinerary or other travel-related information required by the Attorney General.

International Megan's Law § 6(a)(1)(B). The statute also amends SORNA's criminal-enforcement provision by adding a new subsection that punishes anyone required to register under SORNA who "knowingly fails to provide information required by [SORNA] relating to intended travel in foreign commerce" and "engages or attempts to engage in the intended travel in foreign commerce." *Id.* § 6(b)(2).

2. The enactment of the International Megan's Law does not affect the conviction in this case. Petitioner was prosecuted under 18 U.S.C. 2250(a) for a failure to update his registration as required by SORNA, not under the amended version of Section 2250(b) that will now apply to sex offenders' failures to provide information specifically relating to intended travel in foreign commerce. Moreover, by virtue of the Ex Post Facto Clause (U.S. Const. Art. I, § 9, Cl. 3), the amended version of 42 U.S.C. 16914(a)(7) is also inapplicable to petitioner's case.

Prospectively, the new provisions will incidentally capture the kind of conduct underlying petitioner's offense. See U.S. Br. 13. If a registered sex offender gives state sex-offender-registry officials accurate information about his "anticipated dates and places of departure, arrival, *or return*, * * * destination country and address or other contact information therein, means *and purpose of travel*," as will now be required under 42 U.S.C. 16914(a)(7) (emphases added), those officials may be able to infer whether the person is abandoning his residence in that State. And a failure to provide *any* information about a sex offender's intended foreign travel will violate the amended provisions.

Accordingly, the Court's resolution of the question presented in this case—about sex offenders' obligations under the pre-2016 version of SORNA to provide notice of the abandonment of a U.S. residence for one abroad—is unlikely to be of significant prospective importance.

3. On the question presented in this case, the enactment of the International Megan's Law does not support petitioner's reading of SORNA itself. Peti-

tioner has suggested (Br. 49 n.16) that the need for the new legislation indicates that SORNA was not intended "to protect children in foreign countries." The International Megan's Law does reflect Congress's concern about "[c]hild sex tourism" in foreign countries, § 2(6), but, for that very reason, it targets a different and broader category of conduct than is at issue in this case. It requires notice of *all* intended international travel by sex offenders, even when that travel does not involve any change of residence. *Id.* § 6(a)(1)(B); see U.S. Br. 39-40. The enactment of a new statute directed at different conduct to achieve different purposes provides no basis for concluding that Congress believed SORNA itself did not already require a sex offender to provide notice that he was abandoning his residence of record in the United States.

Regardless of what petitioner did after he arrived in the Philippines (*i.e.*, whether or not he engaged in sexual conduct with children there), his failure to keep his registration information current in Kansas posed a threat to SORNA's purposes in the United States. As the government has explained, SORNA was intended to foster accurate registries with current information about where sex offenders live, work, and attend school. Purging registries of out-of-date information is important even with respect to sex offenders who move abroad, because it allows law-enforcement authorities to rule out potential suspects of sex crimes, encourages confidence in the integrity of sex-offender registries, minimizes the need to expend time and resources locating offenders who are no longer at their residences of record, and prevents community members from making decisions on the basis of obsolete information

creating a misimpression that absent offenders still reside in the area. See U.S. Br. 31-34. Thus, petitioner's conviction should be sustained even though Congress has now augmented SORNA with new provisions that serve to protect both U.S. and foreign children from sex offenders.

* * * * *

For the foregoing reasons and those stated in our principal brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

FEBRUARY 2016

APPENDIX

The International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders* provides in pertinent part as follows:

* * * * *

SEC. 2. FINDINGS.

Congress finds the following:

(1) Megan Nicole Kanka, who was 7 years old, was abducted, sexually assaulted, and murdered in 1994, in the State of New Jersey by a violent predator living across the street from her home. Unbeknownst to Megan Kanka and her family, he had been convicted previously of a sex offense against a child.

(2) In 1996, Congress adopted Megan's Law (Public Law 104–145) as a means to encourage States to protect children by identifying the whereabouts of sex offenders and providing the means to monitor their activities.

(3) In 2006, Congress passed the Adam Walsh Child Protection and Safety Act of 2006 (Public Law 109–248) to protect children and the public at large by establishing a comprehensive national system for the registration and notification to the public and law enforcement officers of convicted sex offenders.

(4) Law enforcement reports indicate that known child-sex offenders are traveling internationally.

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* Because the slip law is not yet available, the following text is taken from the enrolled bill, which is available at https://www.congress.gov/114/bills/hr515/BILLS-114hr515enr.pdf.

(5) The commercial sexual exploitation of minors in child sex trafficking and pornography is a global phenomenon. The International Labour Organization has estimated that 1,8000,000 children worldwide are victims of child sex trafficking and pornography each year.

(6) Child sex tourism, where an individual travels to a foreign country and engages in sexual activity with a child in that country, is a form of child exploitation and, where commercial, child sex trafficking.

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SEC. 6. INTERNATIONAL TRAVEL.

(a) REQUIREMENT THAT SEX OFFENDERS PROVIDE INTERNATIONAL TRAVEL RELATED INFORMATION TO SEX OFFENDER REGISTRIES.—Section 114 of the Adam Walsh Child Protection and Safety Act of 2006 (42 U.S.C. 16914) is amended—

(1) in subsection (a)—

(A) by redesignating paragraph (7) as paragraph (8); and;

(B) by inserting after paragraph (6) the following:

"(7) Information relating to intended travel of the sex offender outside the United States, including any anticipated dates and places of departure, arrival, or return, carrier and flight numbers for air travel, destination country and address or other contact information therein, means and purpose of travel, and any other itinerary or other travel-related information required by the Attorney General."; and

(2) by adding at the end the following:

"(c) TIME AND MANNER.—A sex offender shall provide and update information required under subsection (a), including information relating to intended travel outside the United States required under paragraph (7) of that subsection, in conformity with any time and manner requirements prescribed by the Attorney General."

(b) CONFORMING AMENDMENTS TO SECTION 2250 OF TITLE 18, UNITED STATES CODE.—Section 2250 of title 18, United States Code, is amended—

(1) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively;

(2) by inserting after subsection (a) the following:

"(b) INTERNATIONAL TRAVEL REPORTING VIOLATIONS.—Whoever—

"(1) is required to register under the Sex Offender Registration and Notification Act (42 U.S.C. 16901 et seq.);

"(2) knowingly fails to provide information required by the Sex Offender Registration and Notification Act relating to intended travel in foreign commerce; and

"(3) engages or attempts to engage in the intended travel in foreign commerce;

shall be fined under this title, imprisoned not more than 10 years, or both."; and

(3) in subsections (c) and (d), as redesignated, by striking "subsection (a)" each place it appears and inserting "subsection (a) or (b)".

(c) IMPLEMENTATION.—In carrying out this Act, and the amendments made by this Act, the Attorney General may use the resources and capacities of any appropriate agencies of the Department of Justice, including the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, the United States Marshals Service, INTERPOL Washington-U.S. National Central Bureau, the Federal Bureau of Investigation, the Criminal Division, and the United States Attorneys' Offices.

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